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IN THE

Supreme Court of the United States

October Term, 1969

No. 1317

CARLO GAMBINO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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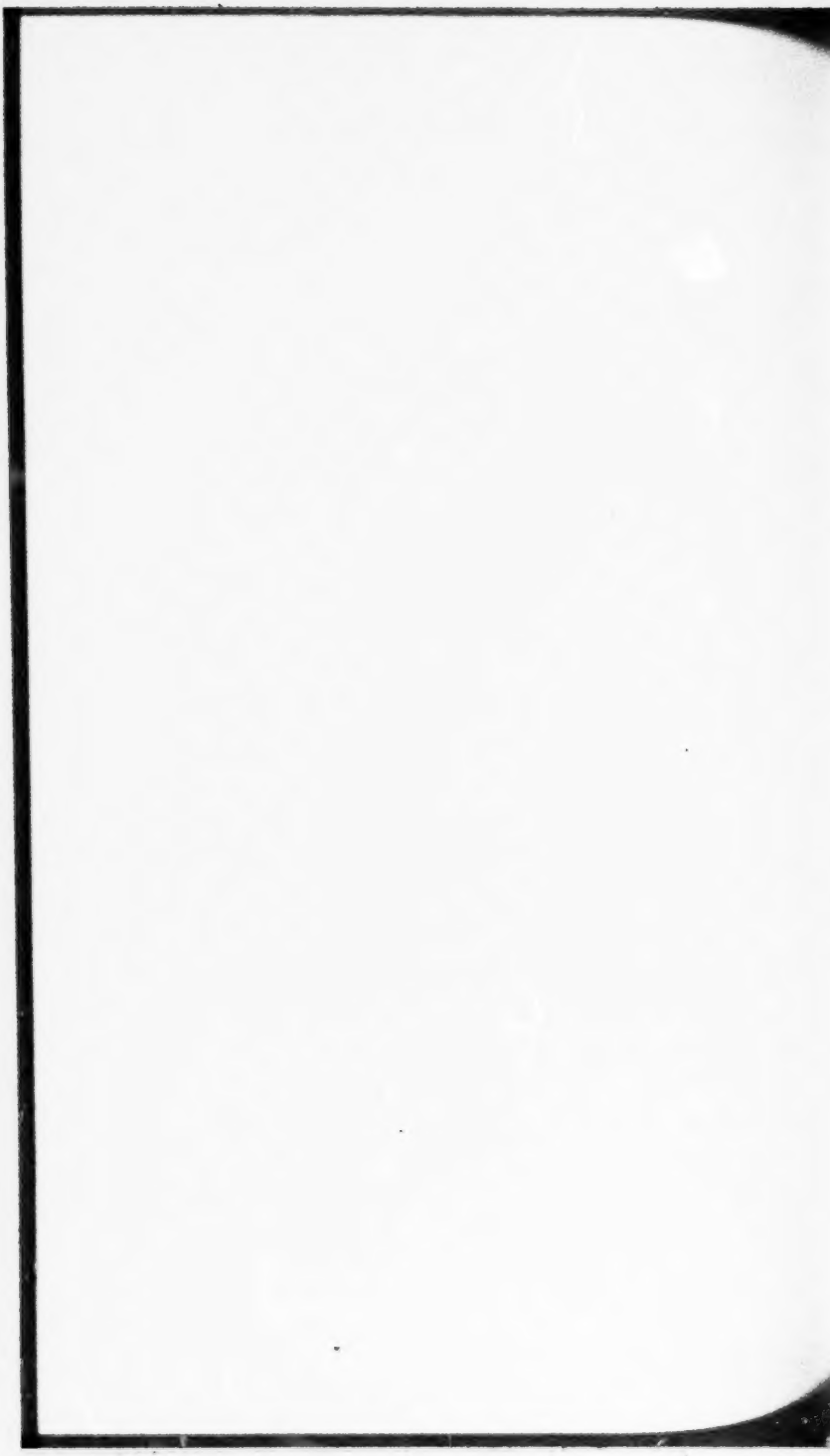

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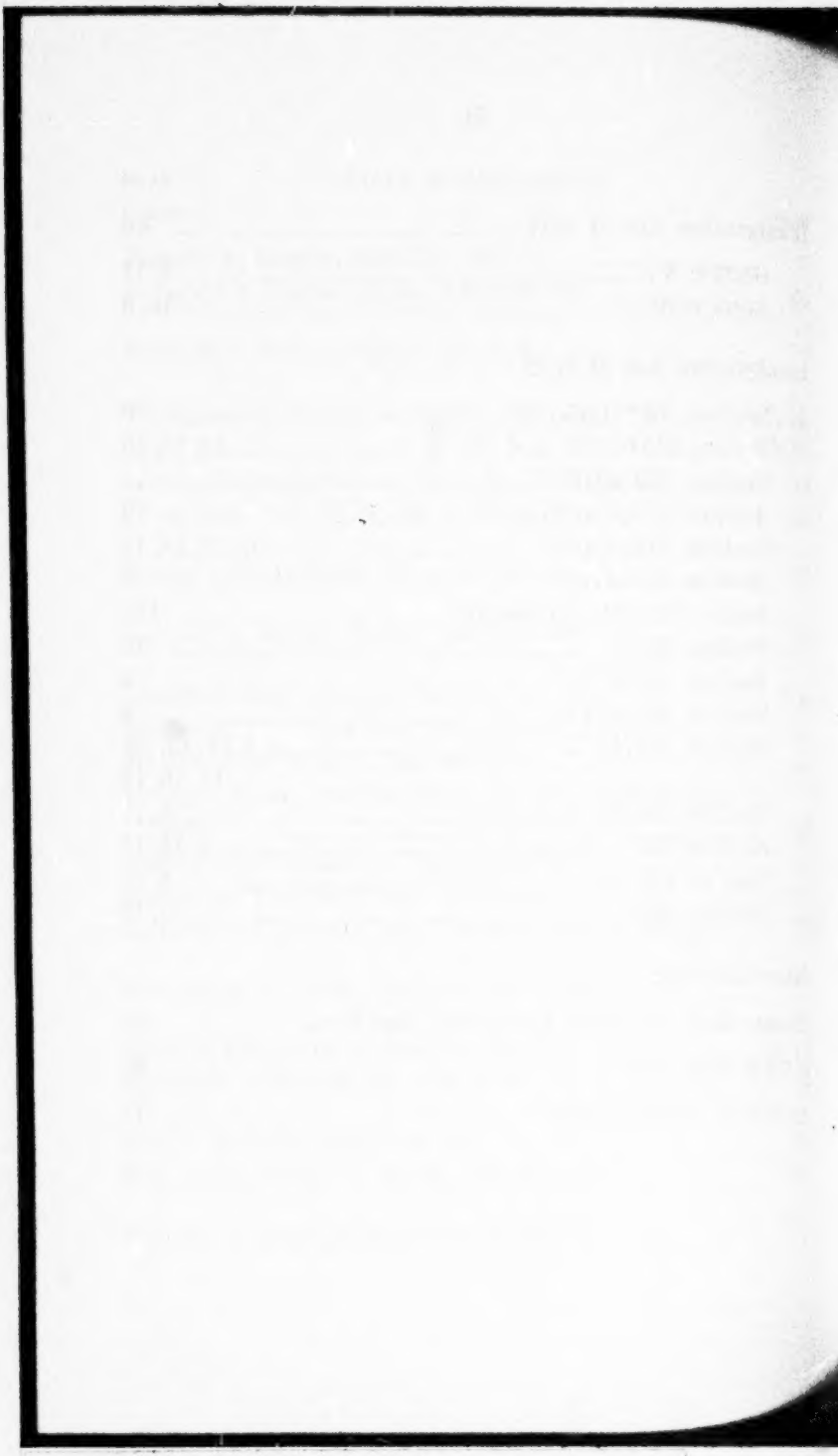

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No. .....

Carlo Gambino,

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—v.—

Immigration and Naturalization Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Second Circuit, entered in *Carlo Gambino* v. *Immigration and Naturalization Service,* on January 7, 1970.

Opinions Below

The opinions of the Court of Appeals, the Board of Immigration Appeals and the Special Inquiry Officer, are contained in the Appendix hereto.

Jurisdiction

The jurisdiction of this Court to review the judgment entered on January 7, 1970 is invoked under 28 U.S.C. Section 1254(1).

Statute Involved

Section 241(f) of the Immigration and Nationality Act of 1952 as amended, added by §16 of the Act of Sept. 26, 1961 (75 Stat. 655) (8 U.S.C. §1251 (f)) provides:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

Questions for Review

1. Whether the alien's departure to Canada in 1935 (followed by return on the same day upon denial of an immigrant visa by a consular officer in Montreal) prohibits his deportation now for entry as a stowaway in 1921.

2. Whether the alien's readmission from Canada was to the status of lawful resident.

3. Whether alien stowaways procure "entry into the United States by fraud or misrepresentation" within the meaning of Section 241(f) of the Act excusing from deportation such aliens "otherwise admissible at time of entry" who, like petitioner here, is the spouse or parent of a United States citizen.

4. Whether the alien was properly denied discretionary relief he requested for failure to answer questions about

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any acquaintance with numerous individuals and about past business activities.

Statement of the Case

The petitioner is a 67 year old native of Italy who entered the United States as a stowaway at Norfolk, Virginia, on December 23, 1921 and has been continuously physically present in the United States except for a trip on July 29, 1935 to Montreal, Canada, to apply for an immigrant visa, which was refused, and return to the United States on the same day at the port of entry at Rouses Point, New York, with the sanction of the Immigration Service pursuant to the administrative procedure called preexamination.[1]

The petitioner suffers from a dangerous heart condition and diabetes, and complications related to these illnesses, which makes his health so precarious that after repeated and extensive physical examinations by doctors of the United States Public Health Service it was concluded that he should be excused from further attendance at his deportation hearing because it endangered his life and should be interrogated only by written interrogatories (App. 3a, 4a). The alien is married to a United States citizen and has several United States children and grandchildren.

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[1] Preexamination, not expressly authorized by statute, was an administrative procedure to permit aliens who were not lawful residents to be preexamined by the Service and if determined to be eligible immigrants to permit them to enter Canada to apply at a United States consulate for immigrant visas on which to reenter the United States as lawful permanent residents. Pursuant to an arrangement between the Canadian and United States authorities the aliens were allowed to enter Canada with the understanding that if refused immigrant visas they would nevertheless be allowed to reenter the United States (App. 21a). Cf. Senate Rep. No. 1515, 81st Cong., 2nd Sess. pp. 603-6, 611.

After petitioner's return from Canada in 1935 no effort was made to deport him until immediately following a much publicized meeting at a private home at Apalachin, New York on November 14, 1957, which he attended, various actions were commenced against those present by various federal and state authorities.[2] By order to show cause issued November 25, 1957 commencing this deportation proceeding petitioner was charged with being deportable for entry as a stowaway in 1921.[3]

In the course of the deportation hearings the Service lodged against the petitioner the additional charge that he was deportable because excludable when he returned from Canada in 1935 without an immigrant visa although the Service in fact admitted him upon his return. Both the Special Inquiry Officer and the Board of Immigration Appeals determined that the petitioner should be deported only on the stowaway charge. (App. 23a)

In the course of the deportation hearing the Special Inquiry Officer concluded that the petitioner who had had heart attacks during earlier hearings (requiring his hospitalization in one case) should not be required to attend further hearings but should be required to answer written interrogatories in connection with the petitioner's request for discretionary relief of voluntary departure (Section 244(e) of the 1952 Act); adjustment of status (Section 245); and record of admission for permanent residence

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[2] A conviction of some of those present at the meeting in effect for conspiring to withhold information about the meeting was reversed and the indictment dismissed for lack of evidence of the conspiracy. *Bufalino* v. *United States*, 285 F2d 408 (C.A. 2).

[3] The Immigration and Nationality Act of 1952 repealed the Immigration Act of 1917 which in Section 19(a) (30 Stat. 889) placed a 5 year period of limitations on aliens deportable because excludable at the time of entry and a 3 year period of limitations on aliens deportable for entering at a place or time not officially designated or without inspection.

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(Section 249). The petitioner answered question 1 of the first group of interrogatories (App. 37a)concerning prior arrests and the last question 11 concerning the filing of income tax returns but refused to answer as irrelevant and immaterial questions 2 to 10 inclusive which included questions as to when petitioner first met and last saw any one of 42 individuals and about a former business of petitioner's which he had left because of his precarious health and about whom the petitioner had met at the so-called Apalachin meeting on November 14, 1957. On refusal to answer these questions the Special Inquiry Officer denied petitioner's application for discretionary relief and ordered him deported on the stowaway charge. The Board of Immigration Appeals affirmed deportation on the stowaway ground and also denied petitioner's contention that his readmission in 1935 granted him permanent residence (App. 14a-15a).

The court below upheld deportation on the stowaway ground and in addition considered and held that petitioner was not excused from deportation by Section 241(f) which relieves from deportation an alien with a United States citizen spouse or child who entered by fraud or misrepresentation. The court below ruled that entry as a stowaway is not entry by fraud or misrepresentation within the meaning of Section 241(f). The court below also affirmed denial of all discretionary relief.

Reasons for Granting the Writ

The court below has decided important questions of first impression which should be determined by this Court in the aid of administration of the immigration laws. Moreover, the decision of the court below conflicts with this Court's decision in *Immigration Service* v. *Errico,* 385 U.S. 214.

1. *Deportation of former stowaway.* The court below accepted the views of the Board of Immigration Appeals and Special Inquiry Officer (hereinafter called BIA and SIO respectively) that the alien's departure to Canada in 1935 did not terminate his status and deportability as a stowaway because the reason for his departure was to seek an immigrant visa from a consular officer at Montreal and upon its denial he immediately returned and was readmitted by the Service to the United States.

It should be noted that no authority is cited below for this extraordinary new doctrine that an alien who leaves the United States and returns is nevertheless deportable because of a defect in his original entry. Moreover, the Service's view is inconsistent with its own action in granting the alien preexamination and thereby determining that he was not excludable and was admissible as an immigrant if he procured and presented an immigrant visa. The grant of preexamination recognized that departure terminated the stowaway status. Refusal of a visa did not restore it.

The petitioner urged below, and submits here, that his departure in 1935 to Canada in fact terminated his status as a stowaway in the United States and he could not thereafter be deported for his 1921 entry as a stowaway. In no respect does the statute suggest that an alien who is deportable because excludable at time of entry retains that status after he departs from the United States and thus in fact terminates his illegal status in the United States.

It is fundamental that every ground of deportation must be clearly set forth in legislation. The choice of statutory grounds of deportation involves serious exercise of Federal legislative power. In view of the serious consequences of deportation of aliens and their families res-

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ident here deportation statutes are construed in favor of the alien and against the Government and the facts must be established by clear, unequivocal and convincing evidence. *Woodby* v. *Immigration Service,* 385 U.S. 276, 286; *Immigration Service* v. *Errico,* 385 U.S. 214, 225; *Bonetti* v. *Rogers,* 356 U.S. 691, 699; *Fong Haw Ton* v. *Phelan,* 333 U.S. 6, 10.

A ground of deportation cannot be created by administrative regulation or by practice or custom, such as the administrative practice of preexamination of an alien by the Service before departure to determine his admissibility on return with an immigrant visa and even permitting him to reenter if denied an immigrant visa. Therefore, unless some statutory provision unmistakably makes the alien deportable for his 1921 entry as a stowaway, even though in 1935 he departed from the United States to Canada, he cannot now by administrative fiat be deported as a stowaway.

Voluntary departure of an alien has always been thought to terminate grounds of deportation related to the manner of entry or breach of conditions of entry applicable to non-immigrants such as transient aliens, visitors or seamen or to stowaways. Departure wipes the slate clean even if the alien's entry was improper or he overstayed the period of temporary admission. When the alien next enters lawfully as an immigrant or non-immigrant he is not deportable because of the manner of his prior entry or because he overstayed the period of his admission on his first entry.

This settled practice is based on the statutory scheme which distinguishes between deportation status based on entry, which status is terminated by departure, and deportation based on serious anti-social conduct in the United States after entry, such as conviction of a crime involving

moral turpitude after entry, which is not expunged by departure and re-entry (§ 241(a) (4) of the 1952 Act). Here the alien has been ordered deported because excludable at the time of entry as a stowaway in 1921 (§ 241(a) (1) of the 1952 Act read with § 3 of the 1917 Act). It is understandable that Congress made culpable conduct in the United States after entry a ground of deportation surviving departure and re-entry but has not made the unlawful manner of entry a ground of deportation surviving departure.

Until the 1952 Act retroactively repealed the statute of limitation on deportation of stowaways in § 19 of the 1917 Act this alien was not deportable even without a departure to Canada (*Lehman* v. *United States*, 353 U.S. 685). But here the alien although no longer protected by the statute of limitations continues to be protected from deportation as a stowaway because of his departure from the United States in 1935. Nothing in the statute suggests that entry as a stowaway survives departure. In the absence of clear statutory authority deportation cannot be sustained.

When the Government preexamined the alien in 1935 and determined that he was not excludable and was admissible and if he departed and returned with an immigrant visa it in effect conceded that his departure terminated his stowaway status. The fact that the consul did not give the alien an immigrant visa and the Service, nevertheless, allowed him to re-enter the United States did not restore his stowaway status in the absence of statutory authority which so provides.[4]

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[4] The preexamination regulation first adopted in 1935 (and later included in 8 CFR Part 142) did not provide that the alien was readmitted into a former status such as stowaway or overstayed visitor.

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The court below does not answer petitioner's argument that Congress has not made deportable as a stowaway an alien who departs from the United States and thereafter is permitted to reenter but merely states its conclusion as follows (App. 3a):

> "Such an absence and return did not effect a valid entry which would erase the effects of an earlier illegal entry (Cf. *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963); *McLeod* v. *Peterson*, 283 F. 2d 180 (3d Cir. 1960). The 1935 departure and return did not erase the effects of the 1921 illegal entry, and did not supersede the previous entry; the order based on the 1921 entry is valid."

Petitioner contends that in fact and under the statutory scheme his departure from the United States, *wholly apart from his reentry*, terminated his status as a stowaway and thereafter he could be deported only on the basis of facts connected with his reentry or for conduct in the United States. It is erroneous to treat petitioner's reentry with permission of the Service as eliminating his departure and the effects of his departure. It would probably be conceded by the Government that if the alien had proceeded not to Montreal but to Rome, Italy and there had been denied an immigrant visa but had been granted a visitor's visa to visit his family in the United States and had been admitted and overstayed his visit he would be deportable only as an overstayed visitor and not as a former stowaway. The petitioner's voluntary and knowing departure to Canada had not less effect in terminating his status as a stowaway. Congress has not provided as a condition of readmission of an alien denied an immigrant visa in Canada that he should assume his former illegal status in the United States. The Service cannot by administrative fiat now add this ground of deportation as part of its administrative procedure of preexamination.

Neither *Fleuti* nor *McLeod*, cited by the court below, supports its position. On the contrary both of these decisions construed the statute to save the alien from deportation. *Fleuti* is the culmination of a line of judicial decisions and a statutory amendment (Section 101(a) (13) of the 1952 Act) to prevent a harsh application of the earlier "strict entry" doctrine under which returning resident aliens were subjected to all the statutory grounds of exclusion upon any "entry" into the United States. *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422. *Fleuti* holds that an alien lawful resident who visited for a couple of hours across the Mexican border upon his return was not making an "entry" subjecting him to application of the grounds of exclusion. This decision patently is no authority for the proposition that petitioner who went to Canada voluntarily and intentionally for a purpose which could only be achieved on foreign soil, application to a consular officer for an immigrant visa, did not depart from the United States and thereby terminate his stowaway status here because as it turned out he was denied an immigrant visa and readmitted to the United States.

The court below, and the BIA and SIO, have adopted a novel construction of the immigration laws apparently for this case and not supported by either judicial or administrative precedent. It is significant that no authority has been cited for the view adopted. If allowed to stand it might be used as precedent selectively to affect the status of other aliens who terminate an illegal status in the United States by departure and thereafter return. Such a novel decision introduces uncertainty into the administration of immigration laws and should be reviewed.

2. *Petitioner was readmitted as a lawful resident.* The court below, and the BIA, also rejected petitioner's contention that the grant of preexamination, determining that

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ioner was not excludable, and the readmission of peti-
er without an immigrant visa in 1935 constituted an
cise of the Attorney General's discretion to admit the
ioner to his unrelinquished United States domicile of
n consecutive years pursuant to the Seventh Proviso
ection 3 of the 1917 Act then in effect.[5] In connection
preexamination proceedings the Seventh Proviso was
nonly exercised to waive documentation and other
nds of exclusion. *Matter of G*, 2 I & N Dec. 905.

ne court below states that there is no record of peti-
er's admission for permanent residence. The petitioner
nits that there is a record that he was readmitted to
United States on July 29, 1935 (App. 3a) and with-
any condition on his admission. This admission should
onstrued as a matter of law as an admission for per-
ent residence waiving an immigrant visa which the
rney General had the power to make.

. *Section 241(f) of the 1952 Act as amended Bars*
ortation. The court below considered and determined
ersely to petitioner his separate contention that his
y as a stowaway was an entry by fraud or misrepre-
ation within the meaning of the ameliorative provi-
s of Section 241(f) excusing from deportation aliens
ndable for such type of entry provided they have
ed States citizen spouses or children as does peti-
er.

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[5] The Seventh Provision of Section 3 of the 1917 Act (39 Stat.
878 reads: "Provided further, that aliens returning after a
porary absence to an unrelinquished United States domicile
even consecutive years may be admitted in the discretion of
Attorney General, and under such conditions as he may pre-
e." Section 212(c) of the 1952 Act now limits this authority
liens admitted for lawful permanent residence but formerly
as exercised in favor of illegal entrants. *Matter of A*, 2 I.N.
459.

The position of the court below is that Congress intended to distinguish between stowaways, expressly excluded by subdivision 18 of Section 212(a), and other aliens excludable under subdivision 19 for seeking to enter by fraud or willfully misrepresenting a material fact and to extend the relief of Section 241(f), couched in language similar but not exactly the same as subdivision 19, only to the latter class of aliens. The petitioner submits that this decision is contrary to this Court's interpretation of the statute in *Immigration Service* v. *Errico* and *Scott* v. *Immigration Service*, decided together, 385 U.S. 214 and erroneously restricts the scope of this remedial statute to exclude all stowaways from its operations.

In *Scott* (reversing the narrow interpretation of this statute by the court below, 350 F.2d 279, repeated in this case) this Court stated (385 U.S. at 217) that the position of the Government and of the court below "would negate the intention of Congress to apply fair humanitarian standards in granting relief from the consequences of their fraud to aliens who are close relatives of United States citizens, * * *."

In *Scott* the alien's fraud was a sham marriage to a United States citizen to obtain nonquota status and entry thereon at a time when a quota number was not available. The Government contended, and the court below agreed, that even if §241(f) excused exclusion under §212(a)(19), nevertheless, the alien was not "otherwise admissible" because also excludable under §211(a)(3) for lack of nonquota status. This Court, however, reversed upon a review of the legislative history which disclosed the intent to grant relief to aliens who would be separated from their families "if the strict requirements of the Immigration and Nationality Act, including the national quotas, were not relaxed for them." (385 U.S. at 224) The First Quota

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Act of May 19, 1921 (45 Stat. 5, effective 15 days after enactment) was in effect when petitioner entered as a stowaway on December 23, 1921.

For its view that §241(f) excused deportation of aliens excludable not only under Section 212(a)(19) but also under §211(a)(3) and (4), read with §212(a)(20), and *under the exclusion provisions generally,* this Court quoted the House Committee Report stating that most of the aliens aided would be Mexican nationals who crossed the border illegally and established families here. This Court then added that nothing in the Committee Report indicated any restriction to Mexicans or failure to include aliens entering from countries not having a land border with the United States such as the present petitioner. It is submitted that this Court's construction of the statute required a decision below that the statute excuses from deporation not only Mexican so-called "wetbacks" (who enter surreptitiously by fording the Rio Grande) or the equivalent stowaways from countries across the sea if they have the requisite United States families. If the statute is to be narrowed by construction to exclude stowaways it should not be done by the court below but by this Court on review of this case.

The court below persisted in its former literal view in *Scott* that Section 241(f) applies only to aliens excludable under Section 212(a)(9) and argues that petitioner cannot be included because excludable under Section 3 of the 1917 Act in 1921 long before Section 212(a)(19) was adopted in the 1952 Act. (App. 7a). But in *Errico* the Government conceded, and this Court ruled, that this literal interpretation of the court below as not the intent of Congress. Section 214(f) applies to any ground of exclusion existing before or after subdivision (f) was added in 1961 to Section 241 of the 1952 Act or existing before or after

Section 212(a)(19) was adopted in 1952 so long as deportation is sought on any ground of exclusion based on or resulting from a fraudulent entry but the only question is whether a stowaway's entry avoiding inspection is a fraudulent entry.

On the face of it entry as a stowaway, at a place not designated and avoiding the required inspection, involves the deception and concealment which are the badges of fraud where there is a duty of disclosure. Apart from entry Congress has made stowing away to obtain transportation a serious criminal offense (18 U.S.C. Section 2199). Stowing away commonly involves fraud in respect of the carrier as well as the Government. In Section 275 of the 1952 Act (8 U.S.C. 1325) Congress punishes in the same manner, and thus equates, the offenses of (1) entering at a place not designated, (2) eluding examination or inspection and (3) obtaining entry by a willfully false or misleading representation or willful concealment of a material fact. Thus Congress treats surreptitious entry and willful misstatements as equally involving fraudulent misrepresentation.

The court below suggests that since stowaways are mentioned expressly in some provisions of the statute the failure to do so excludes them from the provision of Section 241(f) in respect of aliens who have procured entry by fraud or misrepresentation. But stowaways are covered by other sections of the statute without express inclusion. For example, the criminal provisions of Section 275 *supra* in respect of aliens who enter at a place not designated or elude examination certainly include stowaways. And the provision of Section 245 (8 U.S.C. 1255) withholding adjustment of status from aliens not inspected and admitted or paroled into the United States apparently thus withholds this relief from stowaways. Stowaways,

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as an identifiable class of aliens, are expressly mentioned in some sections but are also included in the more general language of other sections of the statute which include, for example, surreptitious entrants over our land borders.

The reference of the court below to the somewhat different treatment of a carrier for bringing in an alien without a visa and for bringing in a stowaway (App. 8a) merely indicates that specific statutory provision is made when different treatment is required by the physical circumstances of stowaway status, such as detention on board the vessel (*Immigration Service* v. *Stanisic*, 395 U.S. 62). But stowaways are obviously within the general language which includes other illegal entrants such as the provision of Sections 245 and 275 already mentioned and also provisions dealing with aliens seeking to enter without valid documentation (Sections 211, 212(a)(19) and (20) and Section 212(i)). Stowaways are statutorily eligible for voluntary departure under the general language of Section 244. *Matter of Pimentel*, 12 I&N Dec. 50.

It is noteworthy that the BIA, the quasi-judicial administrative agency entrusted with the construction of this remedial and technical statute, after being reversed in *Errico*, applied it to aid aliens excludable on grounds other than Section 212(a)(19) including aliens who avoided inspection on entry by claiming United States citizenship. *Matter of K*, 9 I&N Dec. 585; *Matter of Y*, 8 I&N Dec. 143. Similarly, in the case of *In re Yuen Lau Hom*, 289 F. Supp. 205 (S.D.N.Y.) the court held that a rational construction of the statute required that it be construed to include an alien who entered on a nonquota visa believing that she was the spouse of a United States citizen although in fact her husband was an alien. The court rejected the Government's argument that the alien could get no relief because she had not personally committed a willful fraud or misrepresentation.

The BIA's view however was reversed by the Attorney General on the policy ground that circumvention of the visa system would result from applying Section 241(f) to aliens entering on a false claim of citizenship. *Matter of Lee*, Interim Decision No. 1960 of May 1, 1969 (not yet reported in I&N Decisions). Judicial interpretation should not follow the Attorney General's policy decision, influenced by considerations of strict enforcement of the exclusion and deportation provisions, but should achieve the humanitarian legislative purpose of this statute by excusing from deportation all aliens with the necessary family relationships who are deportable because excludable on any statutory ground resulting from the alien's fraud or misrepresentation.

4. *Discretionary Relief Was Improperly Denied.* The court below, together with the BIA and SIO, denied discretionary relief of voluntary departure (Section 244(e)) and record of lawful entry (Section 249) on the ground that the petitioner's requisite good moral character was not shown upon his refusal to answer questions about his acquaintances and former business activities (App. 4a). It is submitted that *Kimm* v. *Rosenberg*, 363 U.S. 405, dealing only with one definite association of the alien which was an express separate ground of deportation (membership in the Communist Party), constitutionally should not be pressed so far as to require an alien to disclose any acquaintance with anyone of 42 named persons no matter how remote or slight the acquaintance. Such an invasion of the freedom of association guaranteed by the First Amendment is an unconstitutional exaction of abandonment of the freedom of association in order to secure the statutory privilege of relief from deportation. *Speiser* v. *Randall*, 357 U.S. 513. The Court in the protection of First Amendment rights should limit the administrative inquiry to reasonable bounds by directing that questions in respect

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of acquaintances be limited to a reasonable period of time and reasonable number of acquaintances.

The alien answered question 1 that he had not been arrested since 1941 and question 11 that he had filed income tax returns for the last ten years (App. 37a) but he refused to answer questions 2 to 10 inclusive (App. 32a-33a) on the ground that they are irrelevant and immaterial to the issue of deportability and the discretionary relief sought and seek information for purposes unrelated to the proceeding (App. 38a).

The questions the alien refused to answer include questions as to when he first met and last saw anyone of 42 individuals and about a business with which he was formerly associated, SGS Company, with which he severed his connection several years ago because of his precarious health. It is evident from the questions that the government sought in this proceeding for relief from deportation to elicit information for other unrelated purposes. For example, questions 8, 9 and 10 inquire about whom the alien met in the home of Joseph Barbara in Apalachin, New York on November 14, 1957. This meeting has been the subject of a criminal prosecution dismissed by this Court (*U.S.* v. *Bufalino*, 285 F.2d 408) and of a great deal of activity by federal and state agencies including the commencement of the present deportation proceeding by service of the order to show cause issued shortly after that meeting on November 25, 1957.

It is clear from the list of questions and the names of many of the 42 persons on the list annexed to the questions that the Service mistakenly and improperly sought to utilize the alien's application for discretionary relief as an opportunity to obtain the information it had been refused in the course of the *Bufalino* case and in the course of the other federal and state investigations. The alien submits that this was an entirely improper and unlawful attempt

to use this administrative proceeding as a means of investigating the alien and numerous other persons in violation of the alien's legal and constitutional rights including his privilege against self-incrimination.

CONCLUSION

In respect of the first reason for granting the writ the administrative authorities have succumbed to the temptation to devise a novel ground of deportation, excludable as a stowaway in 1921 despite departure in 1935, to reach this petitioner who was readmitted in 1935 and not proceeded against until the unrelated notoriety of the Apalachin meeting galvanized the Service into immediate action. The statute does not authorize and no administrative or judicial precedent supports this novel ground of deportation. The court below has approved this novel deportation order and thus a hard case has made bad law. This Court should review and correct this aberration.

In respect of the second reason for the writ the court below has cut back the humanitarian scope of the remedial section 241(f) which this Court determined Congress intended and which the BIA followed until curtailed by the Attorney General for policy reasons of strict enforcement. This Court should restore the intended humanitarian reach of the statute.

Respectfully submitted,

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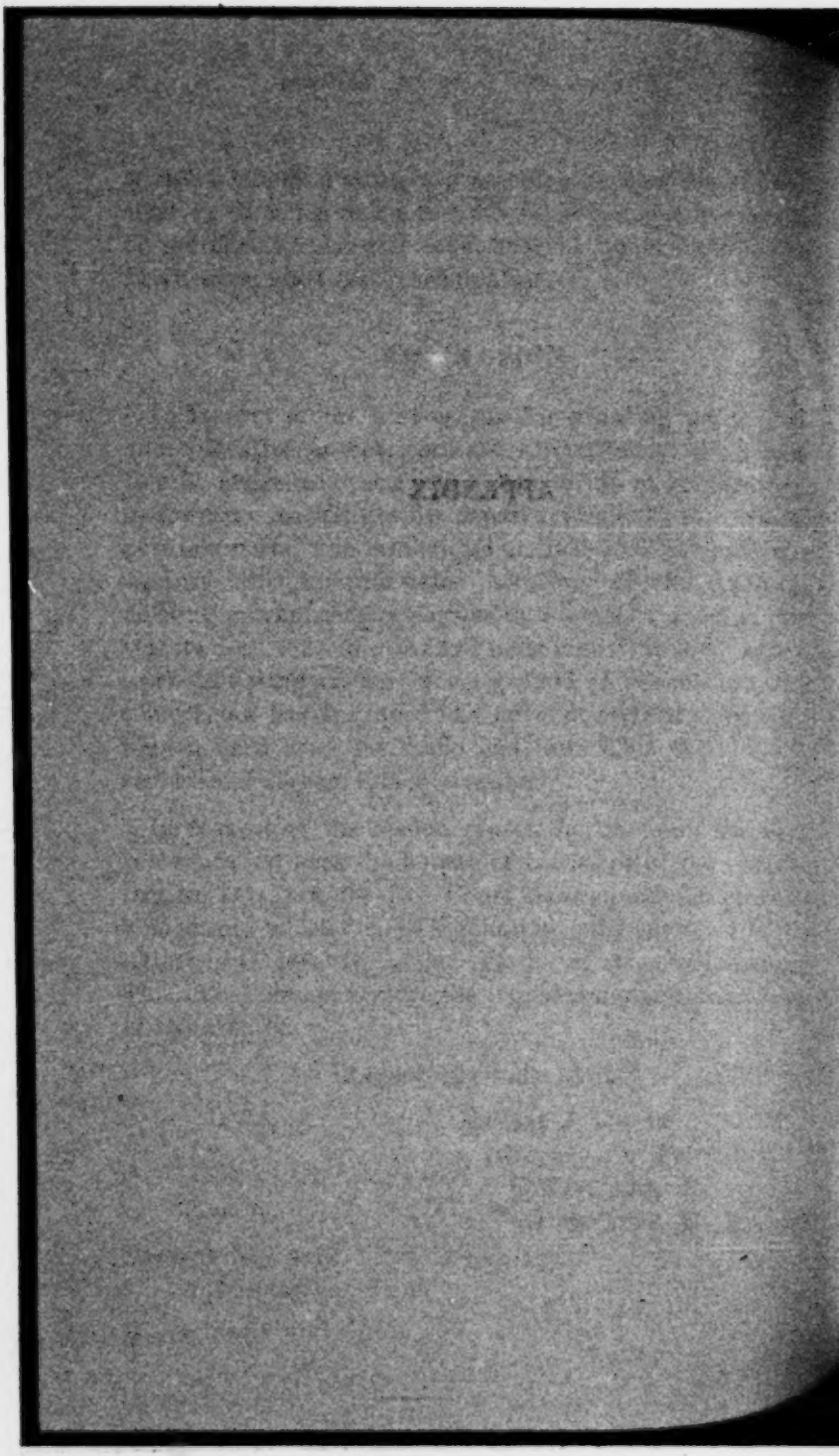
STANLEY N. ZWAIK
Of Counsel

March, 1970

APPENDIX



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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 106—September Term, 1969.

(Argued November 3, 1969 Decided January 7, 1970.)

Docket No. 31781

CARLO GAMBINO,

Petitioner-Appellant,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent-Appellee.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Petition for review of an order of the Board of Immigration Appeals dismissing an appeal from an order of a special inquiry officer of the Immigration and Naturalization Service ordering the deportation of petitioner on the charge that petitioner entered the United States as a stowaway. Petition denied. Order affirmed.

EDWARD J. ENNIS, New York, N. Y. (Stanley N. Zwaik, New York, N. Y., of counsel), *for Petitioner-Appellant.*

DANIEL RIESEL, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, of counsel), *for Respondent-Appellee.*

SMITH, *Circuit Judge*:

Petitioner seeks review under 8 U.S.C. §1105a of an order of the Board of Immigration Appeals (the Board) dismissing an appeal from an order of a special inquiry officer of the Immigration and Naturalization Service (the Service) ordering the deportation of petitioner pursuant to 8 U.S.C. §1251(a)(1) on the charge that petitioner entered the United States illegally on December 23, 1921 as a stowaway. The Board also denied petitioner's requests for discretionary relief brought pursuant to §§244(e), 245 and 249 of the Immigration and Nationality Act of 1952 (the Act), 8 U.S.C. §§1254(e), 1255 and 1259. The grounds of the petition are that a departure to Canada in 1935, under the pre-examination procedures then in effect, and return to this country supersedes the 1921 arrival as an entry, that §241(f) of the Act, 8 U.S.C. §1251(f), bars the deportation of petitioner and that discretionary relief was improperly denied for failure to answer certain questions. We find no error, deny the petition for review and affirm the order of dismissal.

Concededly Gambino's original entry into the United States as a stowaway in 1921 was illegal at that time (and now) and would ordinarily be a ground for deportation pursuant to §241(a)(1) of the Act (8 U.S.C. §1251(a)(1)). But petitioner claims that a departure to Canada and return on the same day in 1935 under a pre-examination pro-

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cedure set up under regulations adopted in that year was a legal entry, or at least an entry superseding the 1921 entry so that the order based on the stowaway entry in 1921 is invalid. We agree with the Board that the 1935 entry has no such effect. Gambino's departure was for the limited and temporary purpose of applying for a consular visa, which was refused in his case because of his arrest record. Such an absence and return did not effect a valid entry which would erase the effects of the earlier illegal entry. Cf. *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963); *McLeod* v. *Peterson*, 283 F.2d 180 (3d Cir. 1960). The 1935 departure and return did not erase the effects of the 1921 illegal entry, and did not supersede the previous entry; the order based on the 1921 entry is valid. Nor was petitioner's return from Canada in 1935 the equivalent of the exercise of the Attorney General's discretionary authority under the 1917 Immigration Act to admit resident aliens returning from a temporary absence. There is no record of Gambino's being lawfully admitted for permanent residence in 1935 or any time.

Gambino, a figure of some notoriety, highlighted by the revelation of his attendance at the much publicized gathering at Appalachin, New York in 1957 (see *United States* v. *Bufalino*, 285 F.2d 408 (2d Cir. 1960)) has been the subject of deportation proceedings since November, 1957. At several points the proceedings were delayed due to Gambino's poor health. After various hearings and delays, a special inquiry officer found in 1966 that Gambino had various ailments including a serious heart condition but that Gambino had been able to perform other activities. The officer concluded that Gambino should submit to further interrogation, but to minimize the danger to Gambino's health, the officer directed that the questioning be conducted

by written interrogatories. Gambino was sent a list of eleven questions concerning his criminal record, business activities, acquaintances and associates (many of whom are convicted felons), his visit to Joseph Barbara's home in Appalachin in 1957, and was asked for production of copies of his income tax returns for the last ten years; however, Gambino only partially answered two of the questions and refused to answer any others. After Gambino's repeated refusal to answer the questions, the inquiry officer denied Gambino's requested relief and ordered Gambino's deportation to Italy on the basis of his illegal entry in 1921 as a stowaway.

The denial of the discretionary relief requested by petitioner was not an abuse of the Attorney General's discretion. Before Gambino could qualify for the discretionary relief of 8 U.S.C. §1255 (adjustment of status to that of permanent resident) he had to meet certain objective prerequisites including that he be admissible to the United States for permanent residence under the Act. One of the grounds for inadmissibility under §212 of the Act is conviction of a crime involving moral turpitude (§212(a)(9)). Gambino was convicted in 1941 for conspiracy to violate the Internal Revenue laws; since his offense included an intent to defraud the United States of taxes due, it involved moral turpitude within the meaning of the Immigration laws. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). Since the Attorney General did not waive this conviction, it stood as a bar to petitioner's relief under 8 U.S.C. §1255. Petitioner also applied for relief under §§249 and 244(e) of the Act, but both sections specifically impose a good moral character requirement for the exercise of such relief. The Service had shown that Gambino had been convicted of crimes, and he had testified at one of the prior hearings that he was

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earning money from the SGS Company. Under these circumstances, his activities and associations, as well as his current sources of income were surely relevant in determining whether the applicant was a person of good moral character and whether the grant of discretionary relief from deportation was justified, and Gambino's repeated failure to supply such information was a good ground for refusing discretionary relief. *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960); see *DeLucia* v. *Immigration and Naturalization Service*, 370 F.2d 305 (7 Cir. 1966), *cert. denied* 386 U.S. 912 (1967).

Petitioner raises an argument that was not presented nor discussed before the Board or the special inquiry officer; Gambino asserts that his deportation is prohibited by §241 (f) of the Act. 8 U.S.C. §1251(f). That subsection provides in relevant part:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they are excludable at the time of entry as aliens who have sought to procure . . . entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or child of a United States citizen. . . ."

Although we would not normally allow the raising of a new objection to the Board's order at this stage in the proceedings, cf. *Unemployment Compensation Committee of Alaska* v. *Aragon*, 329 U.S. 143 (1946), whether stowaways are included within those who sought to procure entry by means of "fraud" in the meaning of this subsection has not been determined. Since the subsection in question is directed at preventing great hardships upon families, deportation is

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such a drastic order considering Gambino's age, health, length of residence in this country and familial ties here, and since other stowaways, long time residents with families here may face a similar determination, we feel that the issue raised should not be summarily dismissed despite its late appearance in these proceedings. We have therefore considered the question and have concluded that section 241(f) was not intended by the Congress to apply to those who entered as stowaways.[1]

Section 212(a) of the Immigration and Nationality Act, 8 U.S.C. §1182(a), lists thirty-one classes of excludable aliens,[2] including:

> (18) Aliens who are stowaways;
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact.

Section 241(f), 8 U.S.C. §1251(f), which creates an exception from deportation for aliens "otherwise admissible" and having certain family ties with persons lawfully in this country, applies only to the deportation of aliens

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1 Apart from the considerations set forth in this opinion, the Board would be compelled to rule that way in deference to the Attorney General's opinion of May 1, 1969, in *Matter of Lee*, holding §241(f) inapplicable to an alien who avoids an immigration inspection by falsely representing he is a citizen. Petitioner admits as much. See also the Board's ruling in *Matter of Cadis*, Jan. 9, 1968, that §241(f) does not apply to non-immigrant visitors.

2 An alien shall be deported if

> at the time of entry [he] was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

Immigration & Nationality Act §241(a)(1), 8 U.S.C. §1251(a)(1).

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on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation. . . .

As the Supreme Court stated in *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214, 217 (1966), "[l]iterally, §241(f) applies only when the alien is charged with entering in violation of §212(a)(19) of the statute." This is confirmed by the House Report on §241(f), which indicates that the section was intended to apply only to §212(a)(19), not to any other subsection in §212(a). See H.R. Rep. No. 1199, 85th Cong., 1st Sess., in [1957] 2 U.S. Code Cong. & Admin. News 2016, at 2022-24. Although the "administrative authorities have consistently held that §241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought, provided that the alien was 'otherwise admissible at the time of entry,'" 385 U.S. at 217, neither that practice nor the *Errico* holding that §241(f) includes aliens guilty of fraud or misrepresentation who were inadmissible because of quota problems aids petitioner here. He not only has not been but could not have been charged under §212(a)(19). Apart from all else, an alien is subject to deportation if "within one or more of the classes of aliens excluded by the law existing *at the time of such entry*," §241(a)(1), 8 U.S.C. §1251(a)(1) [emphasis supplied], and §212(a)(19) was not enacted until 1952, see 1 Gordon & Rosenfield, Immigration Law & Procedure §4.7c at 4-38 (rev. ed. 1967), whereas petitioner entered the country in 1921.[3]

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3 On the other hand, "stowaways" were an excludable class at the time of petitioner's entry, as the Immigration and Naturalization Service found, see Immigration Act of 1917, §3, 39 Stat. 874, and de-

Stowaways are given special treatment throughout the present Act, as they have been in past enactments.[4] When Congress repeated the language of §212(a)(19) in §241(f), it could not possibly have thought this apt to encompass stowaways deportable because they were excludable under §212(a)(18) or its predecessors. In another section of the very enactment that brought §212(a)(19) into being, Congress subjected owners of vessels bringing in stowaways to special penalties, different from those imposed for bringing in aliens with invalid visas. See Immigration & Nationality Act of 1952, §§273(a) and 273(d), presently 8 U.S.C. §§1323(a) and (d); see also 1 Gordon & Rosenfield, *supra*, §2.34 at 2-166. More important, in 1952, as part of the same enactment, Congress eliminated the Attorney General's prior discretion to admit stowaways who were "otherwise admissible." See 1 Gordon & Rosenfield, *supra*, §2.34 at 2-166. Yet when the 1961 Congress enacted a provision giving the Attorney General discretion to admit an alien who had "procured . . . entry into the United States by fraud," §212(i), 8 U.S.C. §1182(i),—a section nearly identical in scope and wording and obviously intended to apply to the same class of aliens as §241(f)[5]—the House Committee report on the bill stated that this was merely a codification of existing law. See H.R. Rep. No. 1086, 87th Cong., 1st Sess., in [1961] 2 U.S. Code Cong. & Admin. News 2950.

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portation on that ground was proper. See *Lehman* v. *United States*, 353 U.S. 685 (1957), upholding deportation of an alien who entered as a stowaway in 1919.

4 See, e.g., Immigration Act of 1917, §3, 39 Stat. 874.

5 The only difference between the sections is that §212(i) applies to the exclusion of aliens and gives the Attorney General discretion whether to admit those "otherwise admissible" and with family ties, whereas §241(f) applies to deportation after entry and is mandatory if the same conditions are met by the alien.

2981. The ambiguous statement in the House Committee report of 1957 that a predecessor of §241(f) would give relief to Mexican nationals who were able to enter the United States "during the time when border-control operations suffered from regrettable laxity," H.R. Rep. No. 1199, 85th Cong., 1st Sess., in [1957] 2 U.S. Code Cong & Admin. News 2016, 2024 greatly relied on by petitioner, is wholly insufficient to overcome the obvious intention to address §241(f) to the same class of aliens covered by §212(a)(19), the statements of the committee chairman on the floor of the House and Senate, 103 Cong. Rec. 16301 (1957) and 107 Cong. Rec. 19653-54 (1961), and the history demonstrating that when Congress meant to legislate about stowaways, it said "stowaways."

Petitioner argues that, when it comes to barring deportation because close family ties have subsequently been established, there is little reason to distinguish stowaways from those who lied about their qualifications for admission. But apart from all that has already been said, there is further proof that Congress intended the distinction to be made. One reason given for extending mandatory relief to all those encompassed by §212(a)(19) was that at the time the predecessor of §241(f) was passed, many private bills were pending that would have barred deportation of aliens who had been guilty of misrepresentation but whose deportation would work extreme hardship to their families. The House Committee Report stated:

> [I]t is unfair and improper to extend the benefit of legislative relief solely to a few selected individuals who are in a position to reach the Congress for redress of grievances. It is felt that that humanitarian approach should be extended to an entire defined class of aliens rather than to selected individuals.

H.R. Rep. No. 1199, 85th Cong., 1st Sess., in [1957] 2 U.S. Code Cong. & Admin. News 2016, 2024. Congress' commendable desire to extend equal mandatory relief to all those within the class defined by §212(a)(19) cannot be translated into similar beneficence for stowaways. Until Congress demonstrates an intention to do so, and it has shown no disposition that way, stowaways, like aliens subject to deportation under the numerous other categories of §212(a), must look to the Attorney General for discretionary relief. We have pointed out there was ample reason for declining to extend this to Gambino.

The petition for review is denied. The order of the Board of Immigration Appeals is affirmed.

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Decision of Board of Immigration Appeals

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Decision of B.I.A.

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Apr. 14, 1967

File: A-5451526—New York

In re: CARLO GAMBINO

IN DEPORTATION PROCEEDINGS

APPEAL

On Behalf of Respondent:

EDWARD J. ENNIS, Esquire
165 Broadway
New York, New York 10006

(Case scheduled for oral argument February 10, 1967, but counsel submitted brief in lieu thereof)

On Behalf of I&N Service:

IRVING A. APPLEMAN
Appellate Trial Attorney
(Brief filed)

Charges:

Order:

Section 241(a)(1), I&N Act (8 USC 1251(a)(1)) —Stowaway

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Decision of B.I.A.

Lodged:

Section 241(a)(1), I&N Act (8 USC 1251(a)(1)) —Immigrant without visa

Application:

Status as permanent resident—I&N Act—section 245 or 249 (8 USC 1255 or 1259), and waiver of excludability—I&N Act—section 212 (8 USC 1182), or voluntary departure—I&N Act—section 244(e) (8 USC 1254)

Respondent appeals from the order of the special inquiry officer requiring his deportation on the first charge stated above. The appeal will be dismissed.

The facts and applicable laws have been fully discussed by the special inquiry officer. Briefly, respondent, a 64-year-old married male, a native of Italy who claims his present citizenship is unknown, entered the United States on December 23, 1921 as a stowaway. In 1935, he underwent preexamination proceedings authorizing him to leave the United States for Canada to apply for an immigrant visa. He went to Canada on July 29, 1935 to apply for his visa; he was refused one and returned on the same day. The special inquiry officer ruled that the departure in 1935 should not be considered as affecting respondent's immigration status in any way since it had been with the permission of the Service. He found respondent had no legal status in the United States and ordered his deportation on the stowaway charge. (The special inquiry officer stated that if he had found that respondent's departure in 1935 did affect his immigration status, he would have ruled that

respondent was deportable on the lodged charge as one who in 1935 had entered without the immigrant visa required of those who come to reside permanently.)

Counsel contends that respondent is not deportable as a stowaway because such a charge is based on the 1921 entry, and respondent's voluntary departure to Canada and return in 1935 terminated any grounds of deportation relating to the manner of his entry in 1921. Counsel contends that there is no authority for disregarding respondent's departure in 1935 for immigration purposes. We think the special inquiry officer's evaluation is correct. Under present judicial interpretations, it is unlikely that his departure in 1935 would be considered as affecting his immigration status since he left with the understanding that he would be readmitted by the Service even though he did not obtain a visa. This being so, the Service properly relied upon the 1921 entry. Upon respondent's return in 1935, the Government had no right to admit him for permanent residence without an immigrant visa. Obviously, respondent resumed the status he had before he left. This was an illegal status (see section 291 of the Act).

If respondent is to be regarded as having made a departure in 1935 which affected his immigration status, then it follows that upon his return, he entered illegally, for he did not have an immigrant visa and he would be deportable on the lodged charge. Counsel's contention, that to hold respondent deportable in connection with the 1935 entry would be unconstitutional, is one we have no jurisdiction to consider.

Counsel contends that the grant of preexamination was equivalent to the exercise by the Attorney General of his

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authority under section 3 of the 1917 Act (to admit stowaways) and under the 7th Proviso of section 3 of the 1917 Act (to admit aliens returning after temporary absence). The short answer is that the procedures mentioned by counsel were separate from the preexamination proceedings, and there is no showing that these procedures were used. Counsel's contention that the power of the Attorney General under the 1917 Act is retained under the savings clause in the 1952 Act since preexamination had been granted must be rejected. The application had been acted upon and was no longer pending.

Respondent applied for relief in the alternative under sections 245 and 249 of the Act. He asked for a waiver of inadmissibility arising out of his conviction for crime in 1941. (He also asked for voluntary departure.) The special inquiry officer found that respondent was ineligible for relief under section 245 because having entered as a stowaway, he entered without inspection, and because he is inadmissible by reason of his conviction. The special inquiry officer found that respondent was ineligible for relief under section 249 because of the conviction. The special inquiry officer refused to waive the criminal ground of inadmissibility because respondent had failed to answer questions concerning his eligibility for discretionary relief. Counsel contends that the questions asked respondent were in violation of his constitutional rights and that they were beyond the proper scope of the proceeding. We believe, for the reasons stated by the special inquiry officer, the questions were pertinent and that refusal to answer was a proper ground for denial of relief.

Counsel requests that if the ground of deportation is sustained by the Board, and the questions are considered ma-

terial, the case be returned to the special inquiry officer to give respondent an opportunity to answer the questions which are believed to be material. Further consideration need not be given respondent's application for discretionary relief without a showing on his part as to the questions which he will answer. We shall dismiss the appeal without prejudice to consideration of a motion to reopen for discretionary relief upon a proper showing by respondent that he is eligible for the relief and that he will testify concerning the questions which had been put to him.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Acting Chairman

Decision of S.I.O.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File: A-5 451 526—New York, N. Y.

DEC 9—1966

In the Matter of)
CARLO GAMBINO) IN DEPORTATION PROCEEDINGS
Respondent)

Charge:

—OSC—I & N Act—Section 241(a)(1)—(8 USC 1251 (a)(1))—Stowaway.

Lodged:

I & N Act—Section 241(a)(1)—(8 USC 1251(a)(1))—immigrant without visa.

Application:

Status as permanent resident—I & N Act—Section 245 or 249—(8 USC 1255 or 1259), and Waiver of Excludability—I & N Act—Section 212—(8 USC 1182); or voluntary departure—I & N Act—Section 244(e)—(8 USC 1254).

In Behalf of Respondent:

EDWARD J. ENNIS, Esq.
165 Broadway
New York, N. Y. 10006

Decision of S.I.O.

In Behalf of Service:

VINCENT A. SCHIANO, Esq.
Trial Attorney
New York, N. Y. 10007

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a 64 year old married male alien, a native of Palermo, Italy who entered the United States at Norfolk, Virginia on December 23, 1921 as a stowaway. Subsequently, on or about July 29, 1935 he departed from the United States in order to obtain an immigration visa from the United States Consul in Montreal, Canada. However, because of his police record this visa was not issued to him pending the submission of further information and advice from the Secretary of State. He returned to the United States on the same day at Rouses Point, New York at which time he intended to remain in this country permanently, although not in possession of an immigration visa. He never left the United States thereafter.

In the order to show cause which was issued on November 25, 1957 the Government charged the respondent with being subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act (8 USC 1251(a)(1)) in that he was excludable under the law existing at the time of such entry as an alien who was a stowaway. During the course of the hearing on January 18, 1963, the Government lodged an additional charge of deportability under the same section of the Immigration and Nationality Act based on the respondent's departure to and return from Canada on July 29, 1935, namely, that he was then excludable as an alien immigrant not in possession of a valid im-

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migration visa and not exempt from the presentation thereof.

Respondent's counsel has conceded the truth of the allegations set forth in the order to show cause and in the statement of the additional charge, with certain reservations. He declined to admit, as alleged by the Service, that the respondent is a national of Italy, claiming that the respondent's present nationality is unknown; and he further declined to concede that the respondent has never been admitted to the United States for permanent residence. He has disputed deportability as to the charge in the order to show cause on the ground that since the respondent departed from the United States subsequent to the entry on which that charge is based, the charge is no longer applicable. He has urged further that the respondent is not deportable on the lodged charge because he left the United States and returned on July 29, 1935, with the sanction of the Immigration Service, in connection with the procedure known as preexamination.

Had the respondent remained in the United States continuously since his entry in 1921, there could be no issue as to his deportability. Section 241(a)(1) of the Immigration and Nationality Act renders deportable any alien who was excludable by the law existing at the time of his entry. Under Section 3 of the Act of February 5, 1917, which was in effect at the time of the respondent's entry in 1921, he was subject to exclusion as a stowaway. Hence under the express language of Section 241(a)(1) he would be subject to deportation as charged in the order to show cause. *Matter of C—*, 5 I & N Dec. 630 (BIA 1954); *Lehmann* v. *Car-*

son, 353 U.S. 685 (1957); *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957).

The fact that the respondent departed from the United States to Canada in 1935 is not deemed to affect the applicability of this charge. While no specific record could be found of his admission to the United States, there is a record of official correspondence indicating that his departure on July 29, 1935 and return to this country were effected under the preexamination procedure. This procedure, although never expressly sanctioned by statute, was devised administratively to permit certain classes of aliens to apply for immigration visas at an American Consulate in Canada, instead of being required to proceed to some distant foreign country. At the time of the respondent's trip to Canada in 1935, it was effectuated through on informal agreement between the United States and Canadian officials whereby the alien would mail the documents required for the immigration visa to the United States Consulate in Canada of his choice, and if advised that his documents appeared to be in order, would submit to preexamination at one of the border ports to determine his admissibility to the United States, when and if in possession of a proper visa. If found to be admissible, he was furnished with a sealed letter to the Canadian Immigration Officer at the port of entry guaranteeing his re-admission to the United States. If upon examination, however, he was found inadmissible, no further assistance was given to him in entering Canada. If the alien secured an immigration visa from the United States Consul and was admitted for permanent residence to the United States on his return

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from Canada, an appropriate notation was to be made on any record of prior admission. If, after entry into Canada the visa was refused, the applicant was re-admitted to the United States but was expressly advised that such re-admission did not vest him with the status of lawful permanent resident.[1] This administrative practice was later codified into formal regulation[2] and was followed until its replacement by Section 245 of the Immigration and Nationality Act (8 USC 1255), which permitted adjustment of status without leaving the United States.[3]

Had the respondent simply departed from the United States at his own initiative without the benefit of preexamination, his return could properly be considered as a new entry. Since he was returning to resume his residence with his family in this country and was not in possession of a valid immigration visa, he could, in such event, be properly considered as an immigrant without a visa subject to exclusion under Section 13(a) of the Act of May 26, 1924, and now subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act on the lodged charge. However, under the circumstances of this case, it is believed that the charge in the order to show cause based on the respondent's entry in 1921 is to be preferred.

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[1] See Exhibit 5 for correspondence between the United States and Canadian authorities formulating this procedure.
See also, *Matter of A—*, 6 I & N Dec. 684, at 690 (BIA, 1955).

[2] 8 CFR, Part 142.

[3] Although preexamination was discontinued with the enactment of the Immigration and Nationality Act of 1952, it was restored by regulation in 1955 (8 CFR, Part 485, later designated as Part 235a) and was finally revoked on August 12, 1959 (24 F.R. 6477).

This view is based upon the fact that the respondent proceeded to Canada for a limited purpose under a recognized procedure, with the sanction of the United States Government; that the absence was of brief duration (less than one day); that he was permitted to return to the United States by its immigration officers with full knowledge of his departure; and that there is no official record of his admission. Cf. *McLeod* v. *Peterson*, 283 F. 2d 180 (3rd Cir. 1960). Consequently for the purpose of this proceeding, it is considered proper to disregard the respondent's trip to Canada and relegate him to the immigration status which he had prior to his departure.

If the contrary view were adopted, and the respondent were considered as having effected an entry into the United States in 1935, then the lodged charge would be applicable. In any event, the respondent is subject to deportation whether deportability be predicated on the charge in the order to show cause or the lodged charge. Clearly his initial unlawful entry was not converted to the status of lawful permanent residence by virtue of the grace extended to him by the Government in affording him an opportunity to obtain an immigrant visa, which never materialized. This fact is confirmed by the absence of any record of his lawful admission for permanent residence, attested to by the official custodian of such records. In 1935 status as a lawful permanent resident could be achieved (absent the enactment of a private bill) only by admission to the United States with an immigration visa issued by an American Consul in a foreign country.[4]

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[4] Section 13(a), Immigration Act of 1924, 43 Stat. 153.

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Since the charge in the order to show cause is deemed to be more appropriate than the lodged charge, that charge alone will be sustained.

Consideration will now be given to the respondent's request for relief from deportation. In this connection he has applied in the alternative for status as a permanent resident pursuant to Sections 245 and 249 of the Immigration and Nationality Act (8 USC 1255) (8 USC 1259) with a waiver of inadmissibility under Section 212(g) of the Act (8 USC 1152(g))[5] based on his conviction in 1941 of conspiracy to conceal alcohol with intent to defraud the United States of taxes; or for voluntary departure. The record reflects that the respondent is married to a native born citizen of the United States and has four native born citizen children ranging in age from 22 to 39 years. When he last testified (in 1963), he stated he was employed as a representative for S.G.S., Labor Consultants, earning $25,000 to $30,000 per year.

The criminal ground for which the waiver is sought is based on respondent's conviction on June 12, 1941 in the District Court of the United States, Eastern District of Pennsylvania, of conspiracy to commit an offense against the United States, to wit, violate the Internal Revenue laws,[6] for which he was sentenced to a fine of $1,000 and imprisonment for one year, suspended and placed on pro-

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[5] Redesignated as Section 212(h) by the Act of October 3, 1965 (79 Stat. 920).

[6] Under 18 U.S.C.A. 88, based on Sections 3296 and 3450, Rev. Stat.; 26 U.S.C.A. 1322; and 18 USC 338, 390, and 409.

bation for five years. On June 17, 1941 the term of imprisonment was reduced to 11 months and 29 days.

In addition to this crime the record reflects the respondent was arrested in Lawrence, Massachusetts on November 13, 1930 as a suspicious person, but the charge was dismissed. On December 8, 1930 he was arrested at Brockton, Massachusetts on a charge of larceny, and after forfeiting bond by failing to appear, was taken into custody by the police in New York City and delivered to the Brockton police on October 22, 1934. Upon making restitution in the sum of $1,000 and paying the expenses of extradition, his case was nolle prossed on February 28, 1935. In the meantime on October 8, 1934 the respondent had been arrested in New York City for violation of the Internal Revenue Laws (Untaxed alcohol) but this charge was dismissed. Subsequently on July 1, 1942 he was convicted in the United States District Court, Eastern District of New York, of conspiracy to transfer alcohol and distilled spirits in connection with the operation of unlawful stills, and on July 16, 1942 was sentenced to 30 days in prison.

The respondent's application for status as a lawful permanent resident (Form I-485) further indicates that in 1959 he was the subject of a proceeding brought in the Magistrate Court of Brooklyn, New York charged with making a false statement about his health in his application for a chauffeur's license in or about 1957 and that he surrendered the license.

In disposing of the applications for relief from deportation, it is pertinent to review the course of this proceeding. The order to show cause was issued on November 25,

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1957, but was not served until August 8, 1958. The initial hearing was held on November 3, 1958 and was adjourned because of the respondent's physical condition and medical history. (It is undisputed that he has been suffering from arteriosclerotic heart disease, among other ailments). The hearing was resumed on January 18, 1963 under medical safeguards at an out-patient clinic of the United States Public Health Service in New York. The alternative applications to avoid deportation were made on February 26, 1963. During the course of interrogation by the Trial Attorney on March 4, 1963 in connection with his criminal record, the respondent claimed that he was experiencing chest pains. Although he was given a rest period during which he was examined by a United States Public Health Service doctor who administered a morphine injection, he persisted in his alleged inability to continue with the hearing. The hearing was then adjourned and was not resumed until February 3, 1966. In the interim, the respondent had submitted to a series of examinations by the United States Public Health Service as to his physical condition. After the last examination the Trial Attorney requested that the deportation hearing be continued under appropriate medical safeguards. Respondent's counsel on the other hand urged that further hearing be deferred indefinitely because respondent could not attend any hearings. A series of sessions were held commencing February 3, 1966 to resolve the issue, during the course of which the respondent's presence was waived. After considering the medical testimony and other pertinent evidence on this issue, the Special Inquiry Officer found that although the respondent was unquestionably suffering from a heart condition and other physical

ailments, that he had been able to pursue various activities involving travel to and from his home, to visit his son's place of business, go to his barbershop some distance from his home, attend various functions of friends and relatives, and visit his physician and dentist. It was therefore concluded that the respondent could and should submit to further interrogation in this proceeding. However, in order to minimize the danger to his health resulting from his personal appearance and questioning at a hearing it was felt that the ends of justice could be served by directing the respondent's questioning by written interrogatories, initially at least, with provision for other appropriate action, dependent upon his answers and cooperation in connection with such interrogatories. An order to this effect was entered on July 8, 1966. This procedure was formulated to insure the orderly continuation of the proceeding without prejudicing any of the respondent's rights.

Pursuant to the ruling on this issue, the Trial Attorney submitted to the respondent a group of eleven written interrogatories (the first of a proposed series), inquiring as to respondent's criminal record; his business activities; his acquaintances and associates; his visit to the home of one Joseph Barbera in Appalachia, New York on or about November 14, 1957; and requesting the production of copies of his income tax returns for the past ten years. The respondent only answered the first interrogatory and that portion of the last interrogatory inquiring as to whether he had filed his income tax returns for the past ten years. His attorney objected to the other questions on the ground that respondent's request for discretionary relief was predicated entirely upon his precarious health and that respondent's past activities and associations as well as income tax

returns were irrelevant and immaterial to the issues of deportability and discretionary relief. However, in view of the respondent's prior criminal record and the substantial income allegedly derived from the labor relations firm which he represented despite his poor health, the special inquiry officer considered the areas embraced in the questions to be proper subjects of inquiry on the applications for relief from deportation. Hence, on September 26, 1966 counsel's objections were overruled and the respondent was directed to answer the remaining questions, and submit the tax returns requested in the interrogatories by October 4, 1966. In connection with this direction it was specifically noted that if the questions were answered, the determination as to the weight given to them would be reserved pending the completion of the hearing. It was further pointed out that the respondent's failure to comply with the direction to answer the questions and submit the tax returns would justify the denial of his applications for discretionary relief and the entry of an order of deportation without further notice or proceedings.

Respondent failed to comply with this direction. On October 19, 1966 he and his attorney were advised that he would be given a final opportunity to present, within 10 days, any evidence or memorandum as to why an order should not be entered directing the respondent's deportation to Italy with a further opportunity to apply for withholding of deportation to that country under Section 243(h) of the Immigration and Nationality Act, as amended, if it were claimed that he would be subject to persecution if deported there. The Trial Attorney was given 5 days thereafter to submit a reply. Respondent and his attorney were further advised that unless something was presented by them

on or before October 29, 1966 to justify a further hearing in this case that the hearing would be considered closed, and a decision would be entered without further notice. Nothing was submitted by the respondent, counsel, or the Trial Attorney pursuant to this instruction.

Viewed against this background, consideration will now be given to the alternative applications for relief from deportation.

Under Section 245 of the Immigration and Nationality Act, adjustment of status may be granted by the Attorney General to an alien (except a crewman) who was inspected and admitted or paroled into the United States and is admissible to this country for permanent residence. If respondent's application is considered with reference to his entry as a stowaway, then he does not meet the inspection requirement. In any event, he is inadmissible under Section 212 (a)(9) of the Immigration and Nationality Act (8 USC 1182(a)(9)) by reason of his conspiracy conviction in 1941, since that offense embraced an intent to defraud the United States of taxes due on alcohol and consequently involves moral turpitude. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *Matter* of *M*—, 8 I & N Dec. 535 (BIA, 1960).

Section 249 of the Immigration and Nationality Act authorizes the Attorney General, in his discretion, to create a record of lawful admission for permanent residence for an alien who entered the United States prior to June 30, 1948,[1] has resided in this country continuously since such

[1] Prior to its amendment by the Act of October 3, 1965 (79 Stat. 920), Section 249 required continuous residence since prior to June 28, 1940.

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entry, is a person of good moral character, and is not ineligible to citizenship. However, an alien inadmissible to the United States under Section 212(a)(9) of the Immigration and Nationality Act is ineligible for this relief.

Under Section 212(h) of the Act, the bar to admissibility under Section 212(a)(9) may be waived in the discretion of the Attorney General, if the alien establishes that his exclusion would result in extreme hardship to a citizen spouse (or other designated relative) and that his admission would not be contrary to the national welfare, safety, or security.

The final alternative relief requested by counsel, is the privilege of voluntary departure which is contained in Section 244(e) of the Immigration and Nationality Act (8 USC 1254(e)) and may be invoked by the Attorney General to permit an alien to depart voluntarily in lieu of deportation.

Both Sections 249 and 244(e) specifically impose a good moral character requirement for the exercise of relief. All the forms of relief requested by the respondent are discretionary, with the power vested in the Attorney General (or his duly authorized delegate—in this case the Special Inquiry Officer[4]) to grant or deny the specified relief. *Castillo* v. *Immigration and Naturalization Service*, 321 F. 2d 123 (2nd Cir. 1963); *Silva* v. *Carter*, 326 F. 2d 315 (9th Cir. 1963), cert. den. 377 U.S. 917; *U.S. ex rel. Bartsch* v. *Watkins*, 175 F. 2d 245 (2nd Cir. 1949). In determining whether

[4] See Section 101(b)(4), Immigration and Nationality Act; 8 CFR 103.1(h); 8 CFR 242.8.

discretion should be exercised in behalf of an alien, his good moral character is a factor which may properly be considered, even though not required by statute. *Matter of Francois—*, 10 I & N Dec. 1968 (BIA, 1963).

In the present posture of the record, the questions which the respondent has refused to answer and the information which he has declined to furnish are pertinent to all the relief which he has requested. In view of his past criminal record, his present associations are material in determining whether he has mended his ways and effected a complete reformation. Likewise, in view of his criminal record and his physical disability which has been repeatedly stressed throughout these proceedings, the nature of his business activities which have yielded him the substantial sum of $25,000-$30,000 per year, is certainly a proper area of inquiry; and his income tax returns for the past ten years to explore his financial structure are relevant to that inquiry.

The burden is upon the alien to establish his eligibility for any requested discretionary relief and that he is worthy of such relief. *8 CFR 242.17(d).* Respondent's failure to answer the questions propounded to him in the interrogatories and to furnish copies of his tax returns justify the denial of his applications for relief. *Kimm* v. *Rosenberg,* 363 U.S. 405, 80 S.Ct. 1139 (1960); *Matter of Mariani,* Int. Dec. 1478 (BIA, 1965); *Matter of DeLucia,* Int. Dec. 1575 (BIA, 1966), affd. *DeLucia* v. *Immigration and Naturalization Service,* C.A.—7th Cir., November 17, 1966. He cannot predicate such applications on his illness alone and decline to furnish information relating to other factors which

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may heavily outweigh his physical condition in the ultimate exercise of discretion to grant or deny the requested relief. As one who seeks grace at the hands of the Government he must be prepared to make full and frank disclosure concerning all matters within his knowledge which may affect the exercise of that grace. *Matter of Y—*, 7 I & N Dec. 697, 700 (BIA, 1918). Nor can the respondent rely upon his heart condition and other physical disabilities to excuse his failure to furnish the information called for by the interrogatories. Despite the fact that he was relieved of the necessity of personally appearing at the hearing and was given every opportunity to furnish the information requested, he has elected to pursue the path of silence, without just cause. Accordingly, it is considered proper to enter an order of deportation against him at the present time despite his long residence in the United States, his family ties here, and his poor physical condition. *Matter of DeLucia*, supra. He has failed to designate any country to which he prefers to be deported. Since he is a native of Italy, was last a citizen of that country, entered the United States from that country in 1921, and there is no other country to which deportation may properly be directed, (in so far as the record reflects) deportation will be ordered to Italy under the provisions of Section 243(a) of the Immigration and Nationality Act, as amended (8 USC 1253 (a)).

ORDER: IT IS ORDERED that the respondent be deported from the United States to Italy on the charge contained in the order to show cause.

HENRY I. MILLMAN
Special Inquiry Officer

Interrogatories

Question No. 1

Since your conviction of 1941, have you been arrested anywhere in the world? (This question was asked of you on March 4, 1963 and remains unanswered.) (Tr. SS)

Question No. 2

Attached hereto as Appendix "A" is a list of names of individuals. Indicate which of them you are acquainted with; when and how you first met each of them; for what period of time you have known each; and when you last saw or communicated with each of them.

Question No. 3

During the course of the proceedings and in your application for relief from deportation, you indicated that you were associated with SGS Company as a partner. Give the names of all the partners or persons associated with that company since about 1954.

Question No. 4

What was the nature of this company?

Question No. 5

What were your specific duties with this company?

Question No. 6

Attached hereto as Appendix "B" is a list of names of various businesses. Indicate which of them were clients of the SGS Company; what services were performed for each of them, and what fee was paid by each of them to SGS.

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Interrogatories

Question No. 7

We have received information that the SGS Company is no longer in existence. Give the following information concerning the termination of this company.

(a) Were dissolution papers filed in any Court or with any agency, and in which Court or agency were they filed? When?

(b) What share or monies were you paid as part of the dissolution process?

(c) Have you undertaken to perform any labor relations services individually or with any organization or association since the dissolution of SGS?

Question No. 8

Were you on or about November 14, 1957 present in the home of Joseph Barbara at his home in Appalachia, New York?

Question No. 9

With whom did you go to the home of Joseph Barbara on the aforesaid date? How long did you remain there? With whom did you speak? By what means did you leave the home of Mr. Barbara and return? With whom did you leave? Why did you go to the home of Joseph Barbara on the said date?

Question No. 10

List all of the persons whom you recall seeing at the home of Joseph Barbara on the aforementioned date.

Interrogatories

Question No. 11

Have you filed income tax returns for the past ten years. If so, attach to your response copies of your income tax returns filed by you for the past ten years.

(End of First Series of Questions)

APPENDIX "A"

1. Jack Litt
2. George Schiller
3. Johnny Dio
4. James Hoffa
5. Louis Frazer
6. Carmine Lombardozzi
7. Philip (Sonny) Amster
8. Salvatore Passalacqua
9. Joseph Barbara
10. Gaetano Lucchese
11. Giovanni Bonventre
12. Joseph Bonanno aka Joe Bananas
13. Henry H. Slazstein
14. Giuseppe Doto aka Joe Adonis
15. Camillo Galante aka Carmine Galante
17. Michele Cisco aka Antoine D'Agostino
18. Salvatore Shillitani
19. Salvatore Caneba aka John Specandio
20. John Mariano
21. Joseph Orsini
22. Ugo Rossi
23. Albert Anastasia (deceased)
24. Russell Buffalino
25. Salvatore Charles Chiri
26. Vito Genovese
27. Joseph Falcone
28. Salvatore Falcone
29. Antonio Magadino
30. Giuseppe Magliocco
31. Michael Miranda

Appendix "A" to Interrogatories

32. John Montana
33. Joseph Profaci
34. Paul Castellano
35. Terry Zappi
36. Peter Lepore
37. Angelo Bruno
38. Frank Scolise
39. John Oddo
40. Sonny Franzese
41. Gerry Catena
42. Thomas "Tommy Ryan" Ebodi

APPENDIX "B"

1. Whitestone Construction Company
2. Wellington Associates
3. Flower & Fifth Avenue Hospital
4. William J. Levitt Inc.
5. Bond Clothes
6. Howard Clothes
7. Concord Hotel
8. Queens National Bank

Answers to Interrogatories

Answer to Question No. 1

To the best of my knowledge, I have not been arrested since 1941 (questioning on or about November 14, 1957 not considered an arrest).

Answer to Question No. 11

Yes.

CARLO GAMBINO

Objections to Interrogatories

The Respondent by his attorney, Edward J. Ennis, objects to questions 2 through 10 inclusive (having answered question nos. 1 and 11) on the grounds that these questions are wholly irrelevant and immaterial to the issue of deportability and the application for discretionary relief and seek information for purposes unrelated to the proceeding. Respondent seeks discretionary relief wholly upon the basis of his present precarious health due to heart disease and diabetes which require him to remain inactive and avoid any stressful situation as the Government well knows from the reports and testimony of the representatives of the United States Public Health Service in this proceeding. Alleged past activities and associations are irrelevant. Copies of Respondent's income tax returns are irrelevant.

WHEREFORE, Respondent respectfully requests that said questions 2 through 10 referring to alleged past associations and activities of Respondent be ruled by the hearing officer to be immaterial and irrelevant to Respondent's application for adjustment of status.

EDWARD J. ENNIS, Esq.
Attorney for Respondent
165 Broadway
New York, N. Y. 10006

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1317

CARLO GAMBINO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 419 F. 2d 1355. The opinions of the Board of Immigration Appeals (Pet. App. 12a–16a) and the special inquiry officer (Pet. App. 17a–31a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1970 (R. 67).[1] The petition for a writ

[1] "R." refers to the numbers on the tabs attached to the documents making up the administrative record and to the numbers (consecutive thereto) on the documents constituting the proceedings in the court of appeals.

of certiorari was filed on March 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's brief excursion to Canada in 1935, under an administrative procedure which permitted aliens unlawfully present in the United States to go there to seek a visa for lawful entry, made him a lawful resident of the United States even though the visa was refused.

2. Whether petitioner, who entered the country as a stowaway, is a person who had procured or sought to procure "visas or other documentation, or entry into the United States by fraud or misrepresentation" and thus is excused from deportation, 8 U.S.C. 1251(f).

3. Whether petitioner's requests for discretionary relief from deportation were properly denied.

STATUTES INVOLVED

The pertinent provisions of Sections 212(a) and 241 (a) and (f) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a), 1251 (a) and (f), are set forth in the Appendix, *infra*, p. 20.

STATEMENT

On December 9, 1966, following proceedings before a special inquiry officer of the Immigration and Naturalization Service (R. 9–62), petitioner was ordered deported to Italy (Pet. App. 17a–31a). The Board of

Immigration Appeals affirmed (Pet. App. 12a–16a) and on petition for review the court of appeals affirmed (Pet. App. 1a–10a).

1. Petitioner is a 67-year-old alien, a native of Italy, who entered the United States at Norfolk, Virginia, on December 23, 1921, as a stowaway. He later married a United States citizen and had four citizen children. Except for a 1935 visit to Canada of less than a day's duration, he has not left this country since his arrival (Pet. App. 18a, 23a).

The 1935 trip was made pursuant to a procedure, followed until 1952,[2] by which aliens unlawfully present in this country were permitted to go to Canada to seek the visas which, if granted, would enable them to become lawful permanent residents. Under the procedure developed, the alien mailed his application for a visa to an American consulate in Canada and, if advised that his papers appeared to be in order, submitted to "preexamination" by American officials at the border to determine if he could be admitted if he had a visa. If he appeared admissible, he was permitted to cross the border into Canada to seek the visa. Because Canadian officials would not have allowed this entry if it appeared that the alien would not be readmitted to the United States, *Matter of A——*, 6 I & N Dec. 684, 690, aliens who appeared inadmissible were not permitted to cross the border, and those who appeared admissible were furnished a

[2] Since 1952, statutes have permitted aliens to adjust their residence status without the necessity of leaving the United States, so that a trip to Canada is no longer necessary. 8 U.S.C. 1255.

sealed letter guaranteeing readmission to the United States even if they failed to secure the visa. On return from Canada, persons who had obtained visas were admitted as lawful permanent residents and a notation to that effect was made on the record of any prior entry; those who had not obtained visas were admitted, but expressly warned that their residence status was unchanged (Pet. App. 20a–21a; Ex. 5, R. 36).

Petitioner applied for a visa from the United States Consul in Montreal, Canada. He was then pre-examined at Rouses Point, New York, and left the country from that point to seek his visa (Pet. App. 18a, 20a–21a). In Montreal, the visa was refused because of doubts as to his eligibility arising from petitioner's police record. Petitioner returned to the United States the same day, without a visa but under the assurance of readmission described above. The requested visa was never issued (Pet. App. 18a, 20a).

At the time, petitioner was protected from deportation by the statutory requirement that deportation proceedings based on excludability at the time of entry be commenced within five years of entry (Section 19, Immigration Act of 1917, 39 Stat. 889). That requirement was retroactively repealed in 1952 (8 U.S.C. 1251(d); Immigration and Nationality Act, Section 403(a)(13), 66 Stat. 279; *Lehmann* v. *Carson*, 353 U.S. 685), and in November of 1957 petitioner was ordered to show cause why he should not be deported as a stowaway, a class of aliens excludable at the time of his entry (8 U.S.C. 1251(a)(1); Section 3, Immigration Act of 1917, 39 Stat. 875, now 8 U.S.C. 1182(a)(18)).

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During the ensuing proceedings, the Service lodged as an additional charge of deportability the claim that petitioner had been inadmissible at the time of his 1935 reentry from Canada, as an immigrant not in possession of a visa and not exempt by law from that requirement (Section 13(a), Immigration Act of 1924, 43 Stat. 161, now (in relevant part) 8 U.S.C. 1182(a)(20)). At the hearing, petitioner's counsel conceded most of the facts outlined above. He claimed, however, that petitioner could not be deported as a stowaway because he had departed from the United States after the entry on which that charge was based. And he contended that petitioner was not deportable as an unvisaed immigrant because the 1935 entry admitted him to the United States for permanent residence, with the approval of the immigration authorities (Pet. App. 18a–19a).

The special inquiry officer noted that petitioner's deportability would be unquestionable had he remained in the United States continuously since his entry as a stowaway, and ruled that the 1935 departure and reentry did not disrupt that continuity (Pet. App. 19a–20a, 22a–23a). While it was necessary for him to pass only on the stowaway charge, the officer indicated that if he was wrong about the effect of the 1935 readmission on that charge, the alternative charge would nonetheless require deportation (Pet. App. 22a).

2. During the deportation proceedings petitioner applied for two forms of discretionary relief from deportation—registration as an alien lawfully admitted for permanent residence (8 U.S.C. 1259) and volun-

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tary departure (8 U.S.C. 1254(e)). But petitioner has a substantial criminal record, including a 1941 federal conviction for conspiring to violate the internal revenue laws.[3] Since this offense involved moral turpitude, see *Jordan* v. *De George*, 341 U.S. 223, petitioner had to secure the Attorney General's waiver of it (8 U.S.C. 1182(h)) to be eligible for registry. As to both forms of relief, he had to show that he was a person of good moral character (Pet. App. 23a). In view of these issues, the special inquiry officer submitted eleven written interrogatories[4] to petitioner requesting details about his arrest record since 1941, his business activities, his tax returns for the past ten years, his associates, and his known participation in 1957 in the famous "Apalachin" conference[5] (Pet. App.

[3] He was sentenced for the 1941 offense to one year's imprisonment (later reduced to eleven months and 29 days) and to pay a $1,000 fine; execution was suspended and he was placed on probation for five years. In 1942 he was convicted and sentenced to 30 days' imprisonment on another federal internal revenue violation. In 1930, following his arrest on a state larceny charge, he forfeited bond and failed to appear; rearrested on the charge four years later in another state, he secured the entry of a *nolle prosequi* after making restitution in the sum of $1,000 and paying the costs of extradition. In 1959 he was charged in a state court with making a false statement about his health in an application for a chauffeur's license; he surrendered the license. He has, in addition, been twice arrested on charges that were later dismissed, including a third accusation (in 1934) of violating the internal revenue laws (Pet. App. 23a–24a).

[4] The questions were submitted in written form in deference to a claim by petitioner's counsel, made after some questions had been answered orally, that petitioner was unable to attend any more hearings on account of his heart condition (Pet. App. 25a–26a).

[5] See *United States* v. *Bufalino*, 285 F. 2d 408, 413(C.A.2).

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25a–27a, 32a–36a). Except to state that he had not been arrested since 1941 and that he had filed tax returns for the mentioned years (of which he declined to supply copies), petitioner refused to answer (Pet. App. 26a, 32a–38a). He was advised that refusal to answer would warrant denial of the requested relief, and the deportation order followed (Pet. App. 27a–31a).

ARGUMENT

1. There is no merit in petitioner's claim that his one-day excursion to Canada in 1935 to seek a visa made him a lawful permanent resident even though the visa was denied (Pet. 6–11). Permission to leave and return to the country was entirely a matter of grace, and the lawfulness of petitioner's subsequent residence was wholly dependent on his success in getting a visa. On returning unsuccessful, petitioner was readmitted under the preexamination procedure only after he had been expressly advised that his reentry would *not* vest him with lawful resident status (*supra*, p. 4). To argue that the decision to readmit him after he failed to obtain a visa terminated his stowaway status and "wipe[d] the slate clean" (Pet. 7) is to mistake what preexamination was about. Readmission was simply a condition without which Canadian cooperation in the preexamination procedure would not have been granted. The returning unsuccessful applicant, in the words of the Board of Immigration Appeals, "resumed the status he had before he left" (Pet. App. 14a).

An analogy can be found in the present procedure

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corresponding to the preexamination process (8 U.S.C. 1255). To qualify for relief under this procedure, an alien must be eligible to receive an immigration visa, and one must be immediately available. In this respect the procedure is like preexamination. The difference is that under Section 1255, the alien need not leave the country to get his visa. But it would hardly be supposed that if an alien's application for Section 1255 relief were denied, his status thereafter would be in any way different from what it had been. No more can it be thought that the unsuccessful applicant for a visa under the preexamination practice acquired a new status following a trip taken solely because it was then a necessary part of getting a visa.

Moreover, even if it were assumed that petitioner's trip gave him a new status, that status would not foreclose deportation. As both the inquiry officer and the Board of Immigration Appeals noted, if petitioner was no longer in stowaway status upon reentry, he was deportable as an alien who entered without a visa, and without being exempted by law from the visa requirement (8 U.S.C. 1182(a)(20)). See *United States ex rel. Matranga* v. *Mackey*, 115 F. Supp. 45, 46–47 (S.D.N.Y.), affirmed, 210 F. 2d 160 (C.A. 2), certiorari denied, 347 U.S. 967.*

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*The so-called "Seventh Proviso of Section 3 of the 1917 Act" (39 Stat. 878, 8 U.S.C. (1934 ed.) 136(p), now 8 U.S.C. 1182(c)) does not aid petitioner. That proviso stated in 1935: "[A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." First,

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But petitioner's brief visit to Canada did not interrupt his residence here in a way that warrants viewing his readmission as a new entry. This Court held in *Rosenberg* v. *Fleuti*, 374 U.S. 449, that a two-hour visit to Mexico by an alien lawfully residing in this country had not so meaningfully interrupted that residence that his return could be treated as an entry within the meaning of the immigration laws. If a brief pleasure trip into Mexico did not disrupt an alien's lawful residence, petitioner's similarly short trip into Canada did not interrupt his unlawful residence. In both cases the alien's presence in this country during the period spanning his brief absence had been substantially continuous. That the ruling in *Fleuti* had consequences favorable to the alien, while its application here would cut the other way (see Pet. 10), is not a valid differentiating factor.

2. Petitioner's claim that Congress has excused from deportation all stowaway aliens with certain close familial ties to citizens or lawful residents (Pet. 11–

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proceedings under the proviso were wholly independent of preexamination proceedings (Pet. App. 15a), and there is no indication that the discretionary authority it grants was either exercised or invoked in this case. If it had been, there would be some written notation of petitioner's admittance *as a lawful permanent resident* following his abortive 1935 trip, yet none exists. On the contrary, visa applicants who failed to secure a visa in Canada under the preexamination procedure were told precisely the opposite when readmitted. Immigration authorities had no power in 1935—nor do they now—to admit for permanent residence an alien not in possession of an immigration visa and not exempt by law from that requirement.

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16) is also untenable.[1] The claim is based on 8 U.S.C. 1251(f), which provides:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

Petitioner's argument is that stowing away is a fraud of sorts and should therefore be deemed within the section's spirit (Pet. 14–15).

Nothing in the text or context of Section 1251(f) supports the suggested interpretation. Section 1251(a)(1) makes *any* alien who is excludable at entry deportable. The various bases for excludability are listed in 8 U.S.C. 1182(a); there are, in all, thirty-one numbered subsections to that section. One of these, Section 1182(a)(19), provides for the exclusion of "[a]ny alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact." *Immigration Service* v. *Errico*, 385 U.S. 214, 217. The language of

[1] This contention was first advanced in the court of appeals, see Pet. App. 5a, but was reached there in view of petitioner's circumstances.

Section 1251(f) is an evident allusion to this subsection. The exclusion of stowaways, on the other hand, is provided for in Section 1182(a)(18). It would be unusual, to say the least, to hold that the language of Section 1251(f), so clearly imitating one subsection, referred to another subsection which it did not at all resemble. Ordinarily, when Congress has meant to legislate about stowaways, as in Section 1182(a)(18), it has said "stowaways" (Pet. App. 9a).

Nor is the proposed construction supported by *Immigration Service* v. *Errico, supra*. The issue there was whether Section 1251(f) "saves from deportation an alien who *misrepresents his status* for the purpose of evading *quota restrictions*, if he has the necessary familial relationship to a United States citizen or lawful permanent resident" (385 U.S. at 215, emphasis added). Both aliens involved had sought and obtained immigration visas (385 U.S. at 215–216). Although they had misrepresented their status, they had in form submitted to and complied with the screening process by which this government seeks to exclude aliens whom Congress has declared inadmissible. No such compliance occurred here, and that is the critical difference.

> In order to obtain an immigrant visa pursuant to the standard requirements, applicable to all immigrants coming from abroad, a visa application is filed with the American consul; a medical examination is administered to assure that the health requirements are satisfied; police certificates are obtained to show any crim-

> inal record; birth records are examined; and a valid passport is required. Furthermore, the applicant is registered and fingerprinted, and must provide satisfactory sworn responses to questions as to residence, organizational memberships, prior arrests or confinement, use of narcotics, previous deportation or immigration violations, ability to read and subversive activities. [*Matter of Lee*, Interim Decision No. 1960, p. 9 (May 1, 1969).]

Matter of Lee concerned an alien who had entered under a false claim of citizenship, and thereby evaded all these requirements. The Attorney General concluded that nothing in the language of Section 1251(f), its legislative history, or this Court's opinion in *Errico* supported the view that Congress intended to permit "the complete circumvention of the immigration visa system established by the Act" (*ibid.*). This reasoning is all the more forceful in this case. The false claimant to citizenship at least presents himself at the portal and subjects himself to possible challenge. A stowaway enters surreptitiously. It requires, we submit, a more convincing showing than petitioner has made to justify the belief that Congress' references in Section 1251(f) to the procural of "visas or other documentation, or entry" through "fraud" and "misrepresentation" were inapt, and that it also meant to include among the section's beneficiaries aliens who had entered through stealth, with no documentation of any kind. Nothing in the legislative history or background of the section, reviewed in *Errico*,

gives ground for any such inference.[8] Cf. *de Vargas* v. *Immigration and Naturalization Service*, 409 F. 2d 335 (C.A. 5), certiorari denied, 396 U.S. 895; *Velasquez Espinosa* v. *Immigration and Naturalization Service*, 404 F. 2d 544, 546 (C.A. 9).

3. There is no substance to petitioner's contention that his requests for discretionary relief from deportation were improperly denied (Pet. 16-18). The granting of such relief "is a matter of discretion and of administrative grace" (*Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77; *Kimm* v. *Rosenberg*, 363 U.S. 405, 408; *Jay* v. *Boyd*, 351 U.S. 345, 354), "analogous to the Board of Parole's powers to release federal prisoners on parole" (*Jay* v. *Boyd*, *supra*, 351 U.S. at 354) or to "a judge's power to suspend the execution

[8] There is an ambiguous statement in H. Rep. No. 1199, 85th Cong., 1st Sess., p. 11 (1957) to the effect that a predecessor of Section 1251(f) would give relief to Mexican nationals who, "during the time when border-control operations suffered from regrettable laxity," had illegally entered the United States and thereafter "establish[ed] a family in this country" (*Errico*, *supra*, 385 U.S. at 224). But this does not necessarily refer to surreptitious entrants, as petitioner suggests (Pet. 13). The reference could be to lax screening of persons who had passed through established points of entry; at all events, the committee would not appear to have had stowaways in mind. On the same page of the report the committee said that the purpose of the proposed legislation was to extend on a blanket basis the same relief which, through private bills, Congress had been granting to selected individuals for some years. We are unaware of any private bills for the relief of stowaways introduced during that period. In any case, the section's legislative history is extensive, and this isolated remark is hardly enough to overcome the conclusion that Congress did not intend to benefit aliens who entered through stealth.

of a sentence, or the President's to pardon a convict" (*United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C.A.2)). The applicant "cannot limit the inquiry to the favorable aspects of the case and reserve the right to be silent on the unfavorable aspects"; he must make "full disclosure of all pertinent information." *Matter of Y—*, 7 I & N Dec. 697, 700; cf. *Kimm* v. *Rosenberg, supra.* Particularly in view of petitioner's criminal record and apparent associates, the inquiry into his past and present associations and business activities was pertinent to determining whether he had "mended his ways" (Pet. App. 30a) and whether he was eligible for, and merited, the favorable exercise of discretion he was requesting. Cf. *De Lucia* v. *Immigation and Naturalization Service*, 370 F. 2d 305, 308 (C.A. 7), certiorari denied, 386 U.S. 912.

We have been informed that petitioner was the subject of electronic surveillance during parts of the years 1962, 1963, and 1964, during the course of the deportation proceedings. However, the Immigration and Naturalization Service did not participate in the surveillance and in our view remand for further proceedings is not required. The relevant facts are as follows:

The deportation proceeding was commenced on November 25, 1957, and the initial hearing was held on November 3, 1958. The hearings were thereafter frequently continued, sometimes for extended periods, primarily because of petitioner's poor health. Peti-

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tioner's applications for discretionary relief from deportation were filed on February 26, 1963; he was directed to answer the written interrogatories on July 8, 1966; his counsel's objections to answering them were overruled on September 26, 1966; and he was ordered deported on December 9, 1966 (Pet. App. 17a, 24a–27a).

On February 26, 1963, in the course of the last session at which he testified, petitioner stated that he was employed as a representative of S.G.S., Labor Consultants, earning $25,000 to $30,000 per year (Pet. App. 23a; R. 12, p. 36). In addition, it was a matter of public knowledge that petitioner had attended the celebrated "Apalachin" conference of November 14, 1957, at the home of Joseph Barbara in Apalachin, New York. See *United States* v. *Bufalino,* 285 F. 2d 408, 413 (C.A. 2); Pet. App. 3a.

Of the eleven written interrogatories propounded to petitioner in connection with his requests for discretionary relief, five (Nos. 3–7) related to his relations with the S.G.S. Company and three (Nos. 8–10) to his visit to the Barbara home (Pet. App. 32a–33a). Questions Nos. 3–5 asked the names of all the partners and persons associated with S.G.S. since 1954, the nature of the company, and what petitioner's duties with it had been. Question No. 6 asked petitioner to indicate which of certain other companies and associations, the names of which were supplied, had been clients of S.G.S. and to give specified information with respect to each. Question No. 7, which was prefaced with the statement that information had been received that S.G.S. was no longer in existence, requested specified details concerning its dissolution.

Question No. 8 asked whether petitioner had been present at the Barbara home at the time of the Apalachin conference and Questions Nos. 9 and 10 requested various details concerning the visit and a list of the persons whom he had seen there.

Of the three remaining interrogatories, Question No. 11 asked if petitioner had filed income tax returns for the preceding ten years and requested, if so, that he furnish copies (he replied that he had filed such returns, but declined to supply copies); Question No. 2 asked that he state which of 42 named persons he knew and to give specified information as to each; and Question No. 1 inquired whether he had been arrested since his 1941 conviction (he answered this question, the only one he responded to fully, in the negative) (Pet. App. 32a, 34a–37a).

Except to the extent indicated, petitioner refused to answer the interrogatories for the stated reason (Pet. App. 38a) that they were

> wholly irrelevant and immaterial to the issue of deportability and the application for discretionary relief and seek information for purposes unrelated to the proceeding. Respondent [petitioner] seeks discretionary relief wholly upon the basis of his present precarious health due to heart disease and diabetes * * *. Alleged past activities and associations are irrelevant. Copies of Respondent's income tax returns are irrelevant.

The special inquiry officer overruled the objection and insisted that all of the questions be answered as a condition of his giving favorable consideration to

the requests for discretionary relief. The officer's reasons for this ruling, as stated in his opinion accompanying the deportation order, were that the questions (Pet. App. 30a–31a)

> are pertinent to all the relief which [petitioner] has requested. In view of his past criminal record, his present associations are material in determining whether he has mended his ways and effected a complete reformation. Likewise, in view of his criminal record and his physical disability which has been repeatedly stressed throughout these proceedings, the nature of his business activities which have yielded him the substantial sum of $25,000–$30,000 per year, is certainly a proper area of inquiry; and his income tax returns for the past ten years to explore his financial structure are relevant to that inquiry.
>
> * * * He cannot predicate such applications [for discretionary relief] on his illness alone and decline to furnish information relating to other factors which may heavily outweigh his physical condition in the ultimate exercise of discretion to grant or deny the requested relief. As one who seeks grace at the hands of the Government he must be prepared to make full and frank disclosure concerning all matters within his knowledge which may affect the exercise of that grace. * * * Nor can the respondent rely upon his heart condition and other physical disabilities to excuse his failure to furnish the information called for by the interrogatories. * * *

Since the facts underlying the determination of deportability—his entry as a stowaway and the circumstances of the 1935 Canadian trip—were conceded by petitioner at the hearings, there is no possible basis for suggesting that that determination was tainted by the surveillance involved. The only arguable basis for a claim of taint concerns the denial of the requests for discretionary relief. It is our submission that that ruling is also unaffected.

Since the granting of relief from deportation is wholly discretionary, we seriously doubt that a denial of relief based on an alien's refusal to answer questions reasonably related to exercise of that discretion would be wrongful, even if it were shown that the questions were necessarily predicated on improperly obtained information. As an applicant for discretionary relief, it was incumbent on petitioner to demonstrate his eligibility for such relief, 8 CFR 242.17(d), and his refusal to respond to relevant questions in itself justified the denial of such relief. *Kimm* v. *Rosenberg*, 363 U.S. 405. *De Lucia* v. *Immigration and Naturalization Service*, 370 F.2d (C.A. 7), certiorari denied, 386 U.S. 912; *Chen* v. *Foley*, 385 F.2d 929 (C.A. 6), certiorari denied, 394 U.S. 838; *Diric* v. *Immigration and Naturalization Service*, 400 F.2d 658 (C.A. 9), certiorari denied, 394 U.S. 1015. See, also *Gardner* v. *Broderick*, 392 U.S. 273; *Sanitation Men* v. *Sanitation Comm'r.*, 392 U.S. 280.

But, in any case, the great majority of the questions petitioner refused to answer were clearly not suggested by anything surreptitiously overheard.*

* While questions 2, 6 and 7 might be thought to have been suggested by information obtained through monitoring activities, we have no information that this was in fact the case, and merely assume it for the sake of argument.

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Questions 3–5, concerning petitioner's relationship with the S.G.S. Company, flowed from and plainly were suggested by his testimony at the hearings. Questions 8–10, regarding the Apalachin conference, follow from the public knowledge of his participation there. And question 11, concerning his tax returns, was suggested and made appropriate by his conviction in 1941 for a tax offense.

The refusal to grant relief was based upon petitioner's refusal to answer *any* of these questions. Given petitioner's stated reason for this refusal, and the substantially indiscriminate character of it, the possibility that one or more questions might be tainted is entirely irrelevant to the refusal to grant relief. There can, in other words, be no causal nexus between the surveillance activities and the hearing officer's determination to deny relief. At very least, it is suggested, any conceivable taint was so "attenuated" as to have "dissipate[d]" altogether. Cf. *Nardone* v. *United States,* 308 U.S. 338, 341; *Wong Sun* v. *United States,* 371 U.S. 471, 491; *Alderman* v. *United States,* 394 U.S. 165, 180–181.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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WILL WILSON,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

JUNE 1970.

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APPENDIX

Sections 212(a) and 241 (a) and (f) of the Immigration and Nationality Act, 66 Stat. 182–183, 204, as amended by the Act of September 26, 1961, § 16, 75 Stat. 655 (8 U.S.C. 1182(a) and 1251 (a) and (f)), provide in pertinent part:

SEC. 212 [8 U.S.C. 1182]. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(18) Aliens who are stowaways;

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

* * * * *

SEC. 241 [8 U.S.C. 1251]. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1317

CARLO GAMBINO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

REPLY BRIEF FOR PETITIONER

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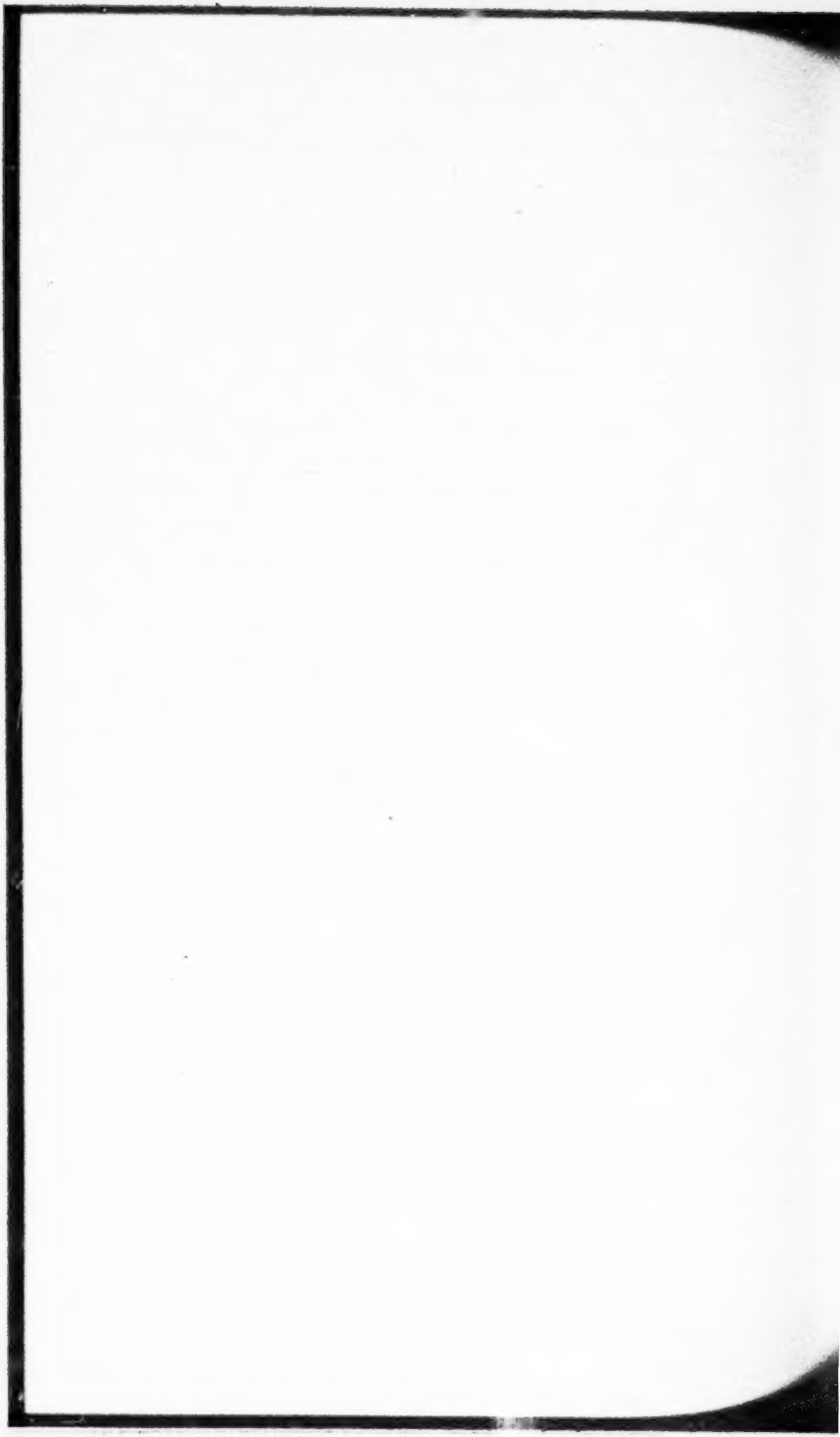

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REPLY BRIEF FOR PETITIONER

A clarification of the issues may be aided by brief comment on several statements in the Government's Brief in Opposition:

1. *Deportability As A Stowaway.* The first question is not, as the Government incorrectly states (Br. 2, 7), whether petitioner's "excursion" to Canada in 1935 made him a lawful permanent resident. The Government well knows that petitioner has never claimed to be a "lawful permanent resident" which is a clearly defined status under the immigration laws and which can be achieved only by entry as a lawful permanent resident or acquisition of lawful permanent residence after entry under the relevant statutory provisions for suspension of deportation, adjustment of status, or record of admission (Sections 101(a)(20), 244, 245 and 249 of the Immigration and Nationality Act

of 1952, 8 U.S.C. Sections 1101(a)(20), 1254, 1255 and 1259). Lawful permanent residence has the important consequences that the alien is free to go abroad and return and may apply for naturalization (Section 316(a) of the 1952 Act, 8 U.S.C. 1427).

Petitioner claims only that he is not deportable for his stowaway entry in 1921 because his departure to Canada in 1935, wholly apart from his return from Canada to his actual residence in the United States, terminated his stowaway status in the United States. Under the administration of the immigration laws numerous aliens are in the United States who have not acquired lawful permanent residence and yet are not deportable under any one of the statutory grounds of deportation or their deportation has been withheld under statutory authority (Section 243(h) of the 1952 Act, 8 U.S.C. 1253) which recognizes the presence of aliens in the United States who do not have lawful permanent residence and are not deportable. The Government's assertion that petitioner claims lawful residence or in any way bases his claim of non-deportability as a stowaway upon his reentry from Canada, rather than merely upon his departure from the United States to Canada, is unnecessarily confusing.

Similarly the Government would again confuse the issue by attributing to petitioner a contention not made on his behalf that readmission from Canada "wipe[d] the slate clean" (Br. 7). Petitioner of course makes no such contention but, as a fairer quotation from the petition shows, contends that "Departure wipes the slate clean * * *" (Pet. 7). The Government's misstatement of petitioner's contention requires repetition of petitioner's position (Pet. 9) that "departure from the United States, *wholly apart from his reentry*, terminated his status a stowaway * * *". There is no authorative support for the Government's con-

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tention, repeating the unsupported statement of the Board of Immigration Appeals herein, that a nonsuccessful applicant for a visa in Canada resumes his prior status upon return (Br. 7). The statute and regulations are entirely silent on this point (Pet. 8) and in the absence of an affirmative regulatory provision departure from the United States wipes out prior status as a stowaway. This is the petitioner's contention on this point.

The Government also states that the Special Inquiry Officer and the Board of Immigration Appeals "noted" that petitioner is deportable on the wholly separate ground lodged at the hearing, but not relied on in the order of deportation based solely on the stowaway charge, that on petitioner's reentry from Canada he was excludable as an immigrant without an immigration visa and therefore deportable (Br. 8). But the Government fails to add that despite references by the administrative agencies charged with administration of the deportation laws to this possible additional charge of deportation they deliberately, in the exercise of their administrative authority, placed the deportation order only on the stowaway ground (Pet. 16a, 31a). The only ground reviewed by the court below was the stowaway ground (Pet. 3a) and appellate review was limited by statute to the "final order of deportation" made in the case (Sec. 106(a) of the 1952 Act, 8 U.S.C. 1105a). In the court below the Government in its brief, as in the Government's brief in opposition here, also stated that the petitioner was also presumably deportable on this additional ground of lack of an immigration visa on return from Canada. Petitioner replied below, as he replies here, that the Special Inquiry Officer and the Board of Immigration Appeals deliberately and affirmatively chose not to place the deportation order on this ground which was not presented for review and was not reviewed by the court below. The Government's repeated reference to this addi-

tional available ground of deportation which was not relied upon as a basis for the deportation order can have no other purpose than to prejudice the review here sought of the stowaway ground of deportation and of course should receive no favorable consideration by this Court.

2. *Section 241(f) Prohibits Deportation.* The Government inaccurately states petitioner's contention to be that stowing away is a "fraud of sorts and should therefore be deemed within the section's spirit" (Br. 10). Petitioner's contention really is that stowing away is actual and legal fraud and precisely within the words of the section which excuses deportation on the ground of excludability for entry by fraud or misrepresentation as well as for entry as an alien who sought to procure or procured a visa or other documentation by fraud or misrepresentation. In *Errico* and *Scott* the Government conceded (385 U.S. at 217) and this Court held that the similarity of language in Section 241(f) to the language in Section 212(a)(19) did not limit Section 241(f) to cases of exclusion under Subdivision 19 but included exclusion under Subdivision 3 of Section 212(a). There is no reason either in logic or statutory history not to apply Section 241(f) to cases of persons excludable under Subdivision 18 as stowaways if in fact stowing away is entry by fraud or misrepresentation as petitioner claims.

The Government speculates (Br. 13 ft. 8) that reference in the legislative history to laxity of Mexican border controls which permitted illegal entrants could refer to lax screening at entry points and not "necessarily refer to surreptitious entrants." But this Court's reference to this legislative history comments that it has been far easier to enter illegally over our common land border with Mexico than from countries without a common land border (385 U.S. at 224). This certainly does not contemplate merely

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lax screening at border stations but includes surreptitious entry elsewhere on the border. In view of the humanitarian reach of the statute there is no reason to exclude stowaways if entry as a stowaway is entry by fraud and misrepresentation as petitioner claims and the Government does not seriously deny.

In view of the electronic surveillance of petitioner first revealed in the Government's brief (p. 14) this case is not ripe for determination of the correctness of denial of discretionary relief. If the petition is granted and petitioner's position sustained either on the ground that he is not deportable as a stowaway or that Section 241(f) bars deportation no occasion arises for a remand and a hearing to determine whether illegally obtained information was a basis of the questions petitioner refused to answer. If the deportation order is sustained the case could then be remanded for further proceedings in respect of the requested discretionary relief. The alternative is to remand the case now for further proceedings. *Black* v. *United States,* 385 U.S. 26; *United States Ex Rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 155.

The petitioner submits that the petition should be granted and the questions of law presented should be determined and the legal effect of electronic surveillance should be considered later only if it becomes necessary to do so.

Respectfully submitted,

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